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# The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil

By  
Megan J. Ballard\*

## I. INTRODUCTION

In the spring of 1997, Brazilian judges ignited a power struggle between the judiciary and President Fernando Henrique Cardoso by hindering the government's privatization of a company many Brazilians considered a national treasure. Earlier that year, Cardoso announced the government's intent to sell off forty-five percent of its ownership in Companhia Vale do Rio Doce (CVRD), an enormous mining and industrial concern and the world's largest iron ore exporter. The minimum price tag for the company was set close to US\$10 billion, making it the largest privatization measure in Latin America to date and attracting bids from companies in Japan, Australia, South Africa, and elsewhere.

The proposed sale prompted protest from leftist political parties and labor unions, as well as student and indigenous groups. The auction, originally scheduled for April 29, 1997, had drawn by that date more than 150 legal challenges from unions<sup>1</sup> and individuals fearful of the sale's ramifications on miners and Brazil's natural mining resources.<sup>2</sup> Even the Brazilian Bar Association petitioned the Supreme Court for extraordinary review of the constitutionality of the

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1. Felipe Patury & João Sorima Neto, *13,500,000.000*, VEJA, July 29, 1998, at 102, 107 (comparing the sale of Telebrás, and the legal actions it attracted, to the legal actions involved in the sale of Vale do Rio Doce).

2. Not all of the suits were filed by individuals or organizations directly at risk. Brazil's "*ação popular*" procedure grants any citizen standing to seek "to annul an act injurious to the public property . . . , to administrative morality, to the environment, and to historical and cultural monuments." BRAZIL. CONST. art. 5, § LXXIII. For example, see *infra* note 5.

planned auction.<sup>3</sup> In response to the litigation, a spokesman for Cardoso charged that opponents to the privatization were using the judiciary as a political instrument.<sup>4</sup>

As the global business community watched with interest, a handful of lower court judges temporarily halted the sale by awarding twenty-two injunctions, based mostly on violations of the law regulating privatizations.<sup>5</sup> These judicial pronouncements and earlier court decisions contrary to the government angered Cardoso.<sup>6</sup> He cautioned that the judiciary ought to begin thinking about its own reform, and, within a few months, Cardoso convened a special session in Congress to seek the approval of a constitutional amendment to compel lower courts to adhere to the decisions of Brazil's highest court.<sup>7</sup> In the interim, leading judges signed a strongly worded declaration warning against the president's tendency toward dictatorship.<sup>8</sup>

Brazilian federal judges recently repeated this warning, charging that Cardoso's criticisms of the judiciary positioned Brazil on the precipice of a civil dictatorship.<sup>9</sup> A spokesperson for a federal judges' group cautioned that Brazil was at risk of "Fujimorization," referring to the authoritarian style of Peru's President Alberto Fujimori, who staged an institutional *coup d'état* to control the

3. The Supreme Court declined to consider the Bar's petition. *Kandir Vê Risco de Adiamento do Leilão*, FOLHA DE SÃO PAULO, Apr. 25, 1997, at 10.

4. *Id.*

5. A São Paulo federal court decision may be characteristic of judicial opinions imposing injunctions. A university professor initiated the case as an "*ação popular*." See *supra* note 2. Judge João Batista Gonçalves issued the injunction based on three reasons: first, the bank responsible for the privatization failed to publish the CVRD sale prospectus in a widely circulated national newspaper as required by law, and instead did so only in specialized business publications. Second, the government did not justify its decision to sell CVRD, also required by the law governing privatizations. And third, the CVRD minimum sales price was undervalued because it failed to take into account the estimated value of the mineral deposits not yet discovered. Octávio Dias, *Juiz Federal de SP Suspende Leilão da Vale*, FOLHA DE SÃO PAULO, Apr. 26, 1997. The term "injunctions" refers in a generic sense to any one of a number of orders prohibiting someone from doing a specified act, or commanding someone to undo something. Brazil's 1988 Constitution broadens the means available to courts for accomplishing injunctions. See *infra* text accompanying notes 85 through 88. The number of cases and injunctions was tallied by the National Development Bank, the entity responsible for administering the privatization, and reported in local and foreign press accounts. See, e.g., Michael Kepp, *Judge Stalls CVRD Divestiture*, 105 AM. METAL MARKET 1 (1997).

6. Fatima Cristina, *Brazil Judges Use CVRD Sale as Weapon Against Government*, REUTERS FIN. SERVICE, May 2, 1997. A few months prior to the onslaught of CVRD litigation, Brazil's highest court granted a pay raise to a group of government workers, a decision that encouraged other public servants to petition courts for equivalent pay raises. *Id.*

7. *Id.* Others involved in the sale also expressed their frustration at the court action. The president of the National Development Bank, which oversaw the CVRD auction, stated, "If a first-level judge is able to paralyze a decision taken by the executive and approved by the legislature, it is a complete inversion of the pyramid." Geoff Dyer, *Row Over Iron Ore Company Sell-off*, FINANCIAL TIMES, May 3, 1997, at 3. Interview with Irapuan Sobral Filho, Staff of Senator Ronaldo Cunha Lima (June 29, 1998). In this interview, Filho recalled that Cardoso convened a special session to urge Congress to adopt Senator Cunha Lima's proposed constitutional amendment to make certain decisions of the Supreme Court binding on lower courts.

8. Cristina, *supra* note 6.

9. Mariângela Gallucci, *Presidente do STJ Aceita CPI do Judiciário*, O ESTADO DE SÃO PAULO, Mar. 17, 1999, at 6; *Associação Diz que Há Risco de "Fujimorização"*, O GLOBO, Mar. 17, 1999, at 8 (reporting on a statement issued by the *Associação de Juízes Federais do Brasil*).

judiciary:<sup>10</sup> "To get there, all that is lacking is to put an end to the judiciary."<sup>11</sup> The executive, he claimed, was taking steps toward that goal by trying to undermine the judiciary through a campaign of defamation. The executive's campaign centered on sensational charges of judicial corruption issued by a close colleague of Cardoso's in the Senate to rally support for the creation of an investigatory commission.<sup>12</sup>

Antagonism between the Brazilian judiciary and executive, while not necessarily a new development in Brazil, became increasingly visible and vehement during the 1990s. Eruptions adhered roughly to the pattern exhibited in the Companhia Vale do Rio Doce (CVRD) incident: lower courts issue decisions unfavorable to the executive's economic or state reform measures, the president or his colleagues dispatch calls to reform the judiciary, and the judiciary responds in turn by criticizing the president.

This increase in antagonism results from the expansion of judges' roles into more controversial political arenas, a transition that evolved over the past decade, garnering mounting social and political attention for Brazilian courts. Similarly, judicial systems around the world have been attracting greater visibility. This widespread interest in courts can be explained, at least in part, by a global consensus favoring the neoliberal model of economic relations in which courts are expected to provide predictability. This economic liberalization strategy, often labeled the "Washington consensus,"<sup>13</sup> encourages a reduced role for government through privatization, economic stabilization through fiscal adjustment, and liberalization of foreign trade.<sup>14</sup>

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10. President Fujimori orchestrated a *coup* on April 5, 1992, closing Congress, proposing an executive-military government by decree, and dismissing a number of judges, including most of the Supreme Court. The prime target of his measures was the court system, which Fujimori depicted as one of Peru's most corrupt institutions. LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* 3 (1998).

11. *Juízes Param e Vêem Risco de "Ditadura,"* FOLHA DE SÃO PAULO, Mar. 18, 1999, at 7.

12. Rosa Costa, *ACM Vai Propor CPI para Investigar Judiciário,* O ESTADO DE SÃO PAULO, Mar. 13, 1999, at 4. The Senate, at the instigation of Senate President Antonio Carlos Magalhães, voted on Mar. 25, 1999, to convene a Parliamentary Inquiry Commission with a mandate to investigate corruption, nepotism, and other irregularities in the judiciary, excluding the Supreme Court.

13. The term "Washington consensus" refers to the home of the international financial institutions that gave rise to the ascendancy of neoliberal ideas. David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 409 (1994).

14. For a more detailed discussion of the components of the "Washington consensus" strategy, see, e.g., Tamara Lothian, *The Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy*, 28 CORNELL INT'L L.J. 169, 175 (1995) and Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 247-48 (1994). Privatization refers to the government's sell off of its interest in state-owned enterprises, reflecting the view that the state should be out of the business of production and should focus instead on developing conditions for the profitability of private firms. Lothian, *supra*, at 177. The idea behind economic stabilization is to correct an imbalance between supply and demand. Stabilization measures try to decrease demand to reduce the current account deficit, a major cause of financial crisis in countries with large debts. In most cases, governments reduce demand by cutting public expenditures. Carrasco, *supra*, at 248. Foreign trade liberalization indicates a shift from an inward-oriented import-substitution strategy to outward-looking free trade. Measures include curtailment of tariff barriers, elimination of quotas and import licenses, abolition of export duties and

A corollary global consensus has emerged regarding the value of the rule of law to the neoliberal model. A market-led economic system requires the rule of law because it “creates certainty and predictability; it leads to lower transaction costs, greater access to capital, and the establishment of level playing fields.”<sup>15</sup> The rule of law, in turn, depends on a well-functioning judiciary that independently determines the rights and obligations of disputants, including government actors, on the basis of pre-established law. In short, “a well-functioning judiciary in which judges apply the law in a fair, even, and predictable manner without undue delays or unaffordable costs is part and parcel of the rule of law.”<sup>16</sup>

Beginning in the late 1980s, international financial institutions such as the World Bank and the Inter-American Development Bank, as well as foreign governments, began to heavily emphasize the socio-economic benefits of well-functioning judiciaries. These institutions and governments provide loans and grants for judicial reform in new democracies, particularly in Latin America and states of the former Soviet Union.<sup>17</sup> Consequently, courts that once led a quiet and marginalized existence throughout much of the world are now subjected to new scrutiny.

This article analyzes the connection between these global economic and political trends and Brazilian strategies for judicial reform.<sup>18</sup> I argue that President Cardoso’s choice of judicial reform proposals is influenced by the government’s attempt to remake Brazil’s economy and bureaucratic state structure to conform to the global neoliberal paradigm.<sup>19</sup> This argument is based on two

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licenses, and product diversification, among others. *Id.* at 249. Changes to the paradigm are beginning to take shape in light of the economic crisis that spread across Asia in 1997 and 1998, affecting markets in Latin America and other regions, but the primary emphasis on the benefit of markets remains.

15. Ibrahim F.I. Shihata, *Legal Framework for Development: The World Bank’s Role in Legal and Judicial Reform*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN, PROCEEDINGS OF A WORLD BANK CONFERENCE 13 (Malcolm Rowat et al. eds., 1995). See also Hector Fix-Fierro & Sergio Lopez-Ayllon, *The Impact of Globalization on the Reform of the State and the Law in Latin America*, 19 HOUS. J. INT’L L. 785, 796 (1997).

16. Shihata, *supra* note 15, at 14.

17. My interest in judicial reform stems from my work with a U.S. Agency for International Development-sponsored judicial reform project in Cambodia in 1995. The project convened European, Latin American, Australian, and North American judges, lawyers, and court administrators to render assistance, expertise, and advice to provincial courts. The result was a muddled effort, the utility of which rested primarily on our ability to deliver copies of new legislation from Phnom Penh to judges in far-removed provinces. This project was joined by judicial training and law reform efforts sponsored by other entities, including foreign governments, the United Nations, the Asian Development Bank, and the American Bar Foundation.

18. Although I refer to trends as “global,” they are at once global and local. Before becoming global, an activity or condition must first sprout locally. When a critical mass of localities worldwide engages in the same activity or adopts the same condition, that activity or condition becomes a global trend that can be more powerful than the sum of its parts. See Boaventura de Sousa Santos, *Towards a Multicultural Conception of Human Rights*, 1 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 1, 3-4 (1997). The pervasiveness of the trend can act as a magnet to attract other localities, reinforcing the momentum of the global trend. In other words, a global condition must be local to give rise to and perpetuate its global status.

19. My focus is on the executive branch because it is the source of, or influence for, much of the reform legislation in Brazil. Factions of the judiciary itself have forwarded judicial reform proposals, but agreement among a majority of judges is hard to come by. Judges’ interests vary accord-

premises. First, the Brazilian judiciary affects the success or failure of Cardoso's economic reforms. As the earlier CVRD story illustrates, successful implementation of the government's efforts to engage the global economy hinges, to a degree, on the outcome of court cases in which Brazilians challenge facets of economic and state reform measures. Second, the judicial reforms backed by Cardoso will likely reduce the judiciary's power to block his economic reforms. While the Brazilian Executive supports judicial reform proposals designed to ameliorate court delay, these reform efforts would have the effect of restraining socially oriented lower courts from derailing the government's project to integrate Brazil's economy into the global market.

Brazil's effort to engage the global market is only one piece of the puzzle that sets the stage for Cardoso's judicial reform initiatives. Two other key components serve to shape the impact of globalization on Brazil's judicial reform strategy. These relate to a domestic political context conditioned by Brazil's emergence from twenty-one years of military rule. First, the 1988 Constitution grants novel individual and social rights and strengthens the judiciary's capacity to protect these rights, in part, by expanding the categories of people with standing to initiate a legal challenge. Second, the end of authoritarianism correlates with the rise of a strain of judicial activism—still noticeable today—that charges judges with the task of protecting vulnerable social classes. The result of the interaction of these three factors has led to the mounting use of courts by plaintiffs opposed to the government's economic policy shifts, further clogging court dockets already beset by backlog.<sup>20</sup> A more troubling result is that this political use of the courts provides an opportunity for socially oriented judges to impair the government's efforts to embed Brazil more firmly in the global economy.

Cardoso has endorsed a judicial reform agenda emphasizing three proposals: a binding precedent proposal that would require lower courts to adhere to the decisions of Brazil's highest court; an "external control" proposal that seeks to create a judicial council, including members outside of the judiciary, to oversee the courts; and an arbitration statute, adopted to revamp Brazil's arbitration procedures. Cardoso's judicial reform strategy appears to emphasize a reduction in court delay, adhering to the global focus on efficient and well-functioning judiciaries. But the proposals his administration supports also would limit the power of socially oriented lower courts. In short, Cardoso's judicial reform agenda is bound up with global trends promoting neoliberal economic changes and a diminished role for the state, as well as internal dynamics involving a rights-oriented post-authoritarian constitution and a strain of socially oriented judicial thought.

Because Brazil is not host to comprehensive, international judicial reform projects, it allows for an interesting and complex examination of the connections

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ing to what rung of the career ladder they occupy. Congress is politically splintered and frequently dependent on executive leadership.

20. At least one of the injunctions halting the CVRD sale, for example, was issued on behalf of a plaintiff who made use of the Constitution's expanded "popular action" mechanism to challenge the auction. See *supra* note 5.

between global economic and political trends and domestic debates over judicial reform.<sup>21</sup> Brazil's political struggle over judicial reform also illustrates how one semi-peripheral state balances globalization processes with local social and political dynamics.<sup>22</sup> The way in which global and local factors work to prompt changes in Brazilian law and legal institutions is important not only for what it reflects about the interaction between law and globalization, but also for what it teaches about a country pivotal to the health of the world economy.<sup>23</sup>

To examine the links between global trends and Brazil's judicial reform proposals, this article comprises five sections.<sup>24</sup> In Section II, I situate my argument in a theoretical framework by sketching established ideas related to the import and export of legal norms and institutions. Section III traces the historical antecedents to debates over judicial reform and the current contours of judicial power. Section IV discusses the dynamics that set the stage for judicial reform: expanded rights and remedies afforded in the 1988 Constitution; the government's new economic and state reform measures designed to enhance Brazil's competitiveness in a global market; and the courts' role in adjudicating disputes related to the government's economic and state reform program. Section V introduces the judicial reform agenda that President Cardoso endorses, in

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21. Brazil does, however, participate in a number of small, informal judicial training programs and international exchanges of scholars and judges executed by U.S.-based or multinational entities. The U.S. Department of Justice, for example, operated a criminal prosecution program in Brazil in 1997 aimed at increasing coordination between police and prosecutors so that judges could be extracted from the investigative phase, smoothing out criminal justice procedures. In addition, Brazilian judges and academics have been invited to participate in various conferences related to judicial reform funded by U.S. foundations (notably Tinker and Ford), the World Bank, the United Nations, the Organization of American States, the Inter-American Development Bank (IADB), and U.S. law schools. For example, the Tinker Foundation, the Organization of American States, the World Bank, and the IADB sponsored a seminar, "Judicial Reform in Latin America: Advances and Obstacles for the New Century," held in Bogota, Colombia, in July of 1998, in which three Brazilians were invited to participate. The IADB sponsored a seminar for Rio de Janeiro state court judges entitled "Administration of Justice in the Americas in a Global Context," in November 1997. A program operated by the University of Baltimore and supported by the United States Information Agency provides another example. This program, initiated in 1998, brings together about two dozen Brazilian and U.S. judges, lawyers, and law professors to exchange ideas related to judicial reform during meetings to be held over a two- or three-year period. Interview with Eliane Botelho Junqueira, in Rio de Janeiro, Braz., (Mar. 1998).

22. On Wallerstein's analytical framework of the modern world system, see IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM I: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY* (1974) (classifying a hierarchy of states as core, periphery, and semiperiphery, based on a world division of labor and resources).

23. Brazil ranks fifth in the world in territorial size, fifth in population (163 million, larger than Russia), and seventh in gross national product. Wayne A. Selcher, *The Politics of Decentralized Federalism, National Diversification, and Regionalism in Brazil*, 40 J. INTERAMERICAN STUD. & WORLD AFFAIRS 25 (1998). It is the third most populous democracy, following the United States and India. *Id.* Its economy constitutes 40% of South America's gross domestic product. Jeffrey E. Garten, *Adrift in the Global Economy*, N.Y. TIMES, Oct. 17, 1998, at A4.

24. The data for this project stems largely from interviews and printed materials gathered in Brazil. I interviewed over three dozen Brazilian judges, lawyers, academics, prosecutors, law students, members of Congress, congressional staff, presidential advisors, representatives from non-governmental organizations, and citizens unrelated to the legal profession. My interviews with judges spanned justices of the highest court to lay judges sitting on labor trial court panels. I also gathered judicial reform legislation, scholarly and technical articles on the judiciary, and copies of related newspaper articles from 1995 to 1999.

light of these dynamics. Finally, section VI discusses possible explanations for Cardoso's choice of judicial reform proposals, suggesting that Cardoso's agenda may be less effective in eliminating court delay than in restricting the power of the lower courts.

My analysis of judicial reform in Brazil is not intended as a description and proffered explanation of the roots of a purely domestic process affecting a domestic institution, nor is it another story about the exportation of Western law and legal norms to developing countries. Instead, I concentrate on the ways in which national policy makers and domestic priorities and circumstances interact with global processes to shape the reform of a national legal institution. More concretely, this article is about how domestic actors, in attempting to establish Brazil more firmly in the global economy, promote a certain strategy for legal transformation. To understand these distinctions, it is useful to trace briefly the history of and various theories regarding the cross-border import and export of law.

## II.

### THE IMPORT AND EXPORT OF LEGAL NORMS AND INSTITUTIONS

Cross-border exchanges of legal ideas are not new. Roman civil law—*Corpus Juris Civilis*—forms the basis of much European law.<sup>25</sup> European colonists imposed their law on their subjects, using law as an important feature of colonial administration.<sup>26</sup> A more recent example of cross-border exchange is the law and development movement of the 1960s and 1970s, an ambitious project premised on the notion that exporting U.S. legal norms to developing countries could produce social change.<sup>27</sup>

The law and development movement assumed that the “modernization” of underdeveloped countries would parallel the pattern of U.S. capitalist development, to which a particular form of law was presumed central. Consequently, adherents encouraged developing countries to adopt U.S. generated ideas about law, and to establish legal institutions and systems of legal education mirroring those in the United States. The object of law and development reform initiatives ultimately was the state, based on the assumption that the state could use law as a tool to improve the life of its citizens. This project operated primarily within the context of the relatively closed national economies of developing countries.

In Brazil, the law and development project was orchestrated primarily by the United States Agency for International Development (USAID) legal staff

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25. See, e.g., JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (2d. ed.) (1993) (tracing the spread of Roman civil law throughout Western Europe).

26. Related examples include post-World War II occupation of Germany, Italy, and Japan, and the administration of internal colonies such as American Indians and Eskimos. All are examples of dominant powers using law as a catalyst for development or modernization in contexts of different legal traditions. John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *AM. J. COMP. L.* 457, 468-69 (1977) (discussing these and other analogous situations).

27. David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L.J.* 1 (1972).



and supported financially by USAID and the Ford Foundation. The Brazilian effort focused significantly on the reform of legal education.<sup>28</sup>

Law and development reform efforts premised on the export of Western legal ideas and institutions have been criticized as being “ethnocentric, imperialistic, atheoretical, and naïve . . .”<sup>29</sup> One significant flaw identified with the movement was the danger in exporting an instrumental view of law. Law perceived primarily in instrumental terms cannot function as a restraint on power when authoritarian groups capture the State.<sup>30</sup> Concerns regarding the viability and advisability of transporting Western legal norms to developing countries were more salient given the insular nature of national borders thirty years ago, when greater variation existed among national economic and legal systems.

A more current framework for the cross-border exchange of legal ideas is based on the processes that comprise the phenomenon of globalization. Globalization is a well-worn term with myriad meanings. On a theoretical level, a useful description of globalization appoints it as “the process by which a given local condition or entity succeeds in extending its reach over the globe and, by doing so, develops the capacity to designate a rival social condition or entity as local.”<sup>31</sup> As applied, globalization frequently refers to a set of interconnected processes enhancing the integration of world markets (increasingly sophisticated communication technology, globally linked financial markets, changing patterns of industrial production, emerging regional trading blocks, and increased importance of multinational corporations) and the distribution of different stages of the production process to those areas with the most obvious comparative advantage.<sup>32</sup> At the heart of this conception of globalization is a worldwide emphasis on eliminating legal restrictions on trade and investment.

The relationship between globalization and law fundamentally presumes that the process of global economic and political transformation creates a con-

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28. The Ford Foundation and USAID promoted the establishment of CEPED in 1966 (*Centro de Estudos e Pesquisas no Ensino do Direito*) with the idea that the reform of legal education could alter law faculties—a main source of members of ruling classes or political elite. Adherents also considered law schools to be a wedge for “modernization” of the entire legal system. JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

29. David M. Trubek, *Law and Development: Then and Now*, AM. SOC. OF INT’L L. PROCEEDINGS OF THE 90<sup>TH</sup> ANNUAL MEETING, Mar. 27-30, 1996, at 233. Critical analyses of the law and development movement are found in GARDNER, *supra* note 28; Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 CASE W. RES. J. INT’L L. 167 (1997); Merryman, *supra* note 25; Francis G. Synder, *Law and Development in the Light of Dependency Theory*, 14 LAW & SOC’Y REV. 723 (1980); and David M. Trubek & Marc Galanter, *Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WIS. L. REV. 1062 (1974).

30. Trubek & Galanter, *supra* note 29, at 1080.

31. Santos, *supra* note 18, at 3. Santos argues that there is no genuine globalization, but rather only the successful globalization of a specific localism. In other words, every global condition has a local root.

32. Harvey B. Feingenbaum, *Globaloney Revisited: Globalization Viewed with a Critical and Sympathetic Eye* (Apr. 1999) (paper prepared for presentation at the Conference entitled “The Impact of Globalization on Governance,” sponsored by the Structure and Organization of Government Research Committee of the International Political Science Association, University of Wisconsin, Madison, on file with the author). See also David M. Trubek et al., *supra* note 13, at 408-09.

sensus regarding legal principles and institutions that states cannot ignore without consequence. "The neoliberal development model, with its greater reliance on markets and the private sector, has changed the ground rules of both private and public institutions, calling for a new legal framework for development conducive to trade, financing and investment."<sup>33</sup> The current object of law reform is not to enhance the way the state uses law, but to diminish the role of the state and create a legal structure to facilitate the operation of the market system. Globalization processes provide a catalyst for legal homogeneity, such as the coordination among states of import and export regulations for the purposes of encouraging unfettered trade. Indeed, in areas such as contract law, commercial law, and even constitutional law there is greater uniformity of national laws across borders.<sup>34</sup> Some scholars also postulate that globalization processes have created a new sphere in which domestic or transnational actors join to create legal norms.<sup>35</sup> In other arenas, globalization has prompted a consensus for change, but this consensus lacks an exact prescription, such as the notion that courts should be structured to facilitate economic development.<sup>36</sup>

Much of the literature regarding law and globalization investigates how global pressures, or actors operating in a global sphere, influence national law and legal institutions. This relationship presumes that actors in the global realm directly influence (or try to influence) local change—a top-down trajectory from the global sphere to the local condition to be altered.<sup>37</sup> Analyses based on a top-down perspective are useful in critiquing the law and development project in which Western legal norms were transplanted in relatively closed national contexts. This perspective may be less relevant in evaluating the relationship between law and globalization, which occurs in a context of eroding national barriers. Accordingly, instead of focusing on the top-down trajectory of direct law reform initiatives sponsored by global actors, my analysis turns the relationship upside down and looks at how local actors instigate changes to a local condition, in part, to satisfy a global mandate—a bottom-up approach to the study of law and globalization. This study differs from most law and globalization

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33. Boaventura de Sousa Santos, *The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts*, 3 (June 1998) (unpublished manuscript on file with the author).

34. Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 474 (1995) (citing generally Martin J. Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993)) (book review).

35. See, e.g., Kathryn Sikkink, *Transnational Advocacy Networks and the Social Construction of Legal Rules* (1997) (unpublished manuscript on file with author) (suggesting that transnational non-governmental actors can be key instigators of new social and legal norms related to human rights); Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27 (1995) (positing, generally, that lawyers and related professionals effect the construction of legal norms in a global realm).

36. Santos suggests that "[o]f all the liberal global consensuses, the rule of law/judicial consensus is by far the most complex and ambiguous." Santos, *supra* note 33, at 4.

37. For example, studies are emerging that analyze how judicial reform projects sponsored by foreign donors and international financial institutions affect, or fail to affect, change within a local court system. See, e.g., HAMMERGREN, *supra* note 10; LAWYERS COMMITTEE FOR HUMAN RIGHTS & VENEZUELAN PROGRAM FOR HUMAN RIGHTS EDUCATION AND ACTION, *HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM* (1996).

scholarship and law and development studies in that it portrays domestic actors as the immediate catalysts for legal change, rather than depicting them simply as adherents to a pre-ordained recipe for legal change issued by transnational or global forces.

### III.

#### HISTORICAL CONTEXT: AUTHORITARIANISM, JUDICIAL RESISTANCE, AND THE ROLE OF THE LAW

A full picture of the factors contributing to current debates over judicial reform in Brazil requires a brief historical context, particularly regarding the recent period of military rule (1964-1985). This article contends that Cardoso's judicial reform agenda is influenced by the government's efforts to engage in the global economy. Cardoso's judicial reform proposals seek to ease the court backlog resulting from an explosion of cases challenging the government's new economic and state reform policies—policies that reflect the global neoliberal consensus. Significantly, the judicial changes that Cardoso backs also would restrict the power of socially oriented lower courts. Brazil's history of authoritarianism provides a foundational basis for two elements of this argument. First, the steep rise in litigation to oppose economic and state reform initiatives has been facilitated, if not invited, by the expanded rights and judicial remedies embodied in the 1988 Constitution, a document shaped by Brazil's 1964-1985 military era. Second, as military rulers prepared to relinquish power, a judicial philosophy emerged that encouraged judges to wield their authority to protect the more vulnerable sectors of Brazilian society that suffered from military repression and economic policy missteps. Socially oriented judicial activism at the end of the 1990s has impaired the government's implementation of economic and state reform initiatives, a trend that Cardoso's judicial reform proposals would restrict.

In addition to providing a basis for understanding the advent of new rights and remedies in the 1988 Constitution and the evolution of socially oriented judicial activism, this section underscores early patterns of conflict between the executive and judicial branches, pointing out that, in the context of these conflicts, the executive confined the reach of the judiciary by repeatedly altering the legal structure empowering the judiciary. Finally, this section provides demographic background on the judiciary.

The Brazilian legal system stems from the civil law tradition and a colonial legacy of weak courts and strict separation of powers. As in many civil law systems, judges were, and continue to be, restricted from interfering in the legislature's sphere, largely by being prevented from making decisions applicable to future cases. In much of Latin America, the combination of an extremely formalistic legal system and the narrow role of judges generated an enclave-style judicial bureaucracy that had a tendency to be detached from the evolution of

Latin American societies in the political, social, and economic spheres.<sup>38</sup> In Brazil, the recent period of military rule served to align judge's institutional interests more closely with society's concerns related to authoritarianism.

In 1964, the Brazilian military overthrew the constitutional government of João Goulart, whom the military considered a dangerous radical who flouted the rule of law.<sup>39</sup> The new military rulers promised to "restore legality, reinforce the threatened democratic institutions, . . . and eliminate the danger of subversion and communism."<sup>40</sup> For the next twenty years, the Brazilian armed forces ruled the country under a legal structure crafted to meet the regime's "revolutionary" aspirations. Throughout this period, the military operated under "the long dominant Portuguese and Brazilian elitist assumption that the solution to any problem was a new law."<sup>41</sup> The regime used legal devices to lend itself formal legitimacy and recast the role of the courts.

The military launched its first decade of power with laws imposing rigid social and political control. It conducted purges within Congress, the civil service, the public university, and the military itself. The Supreme Court (*Supremo Tribunal Federal*, or STF) was one of the few Brazilian institutions that the military rulers initially left intact. The soft line of the military regime, responsible for maintaining the integrity of the Supreme Court, "believed that the Court could be persuaded that the disruption of public order and the imminent threat of social revolution required a brief period of departure from settled interpretations of positive law."<sup>42</sup> The Court, however, soon proved unwilling to read existing law to allow for the military's repressive measures. In the face of this resistance, the authoritarian regime eventually targeted the courts for failing to capitulate entirely.

The initial build up of antagonism between the military regime and the courts centered on the Military Police Inquiries (*Inquéritos Policial Militar*, IPMs), the legal institution through which the military attempted to combat subversion. The regime established these "military-cum-police inquiry panels"<sup>43</sup> by executive decree the week following its takeover to investigate the activities of people considered to have committed crimes "against the state, its property, public or social order, or engaged in acts of revolutionary war."<sup>44</sup> The article establishing IPMs did not preclude judicial review of IPM investigations.<sup>45</sup>

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38. Felipe Sáez García, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV. 1267, 1288 (1998).

39. Goulart had pursued relatively minor populist reforms, but his leadership coincided with a leftist nationalist trend within the intelligentsia, an increasingly mobilized urban labor movement, as well as the activism of peasants in the drought-stricken Northeast in the early 1960s.

40. MARIA HELENA MOREIRA ALVES, STATE AND OPPOSITION IN MILITARY BRAZIL 31 (1985).

41. THOMAS E. SKIDMORE, THE POLITICS OF MILITARY RULE IN BRAZIL, 1964-85, 57-58 (1988).

42. Mark J. Osiel, *Dialogue with Dictators: Judicial Resistance in Argentina and Brazil*, 20 LAW & SOC. INQUIRY 481, 532 (1995).

43. SKIDMORE, *supra* note 41, at 47.

44. MOREIRA ALVES, *supra* note 40, at 33.

45. Institutional Act No. 1, art. 8 (Apr. 9, 1964). For a discussion of this Act, see MOREIRA ALVES, *supra* note 40, at 32-34.

When both the state and federal judiciaries exercised appellate review to reverse the decisions of the IPMs, tensions increased between the traditional legal structure and the extralegal military structure.

The STF magnified this tension by repeatedly ruling against government prosecutors in key “subversion” cases.<sup>46</sup> Military indignation over this STF resistance contributed to an October 1965 executive decree that amended the Constitution in a manner which restricted the judiciary’s independence. Institutional Act No. 2 increased the number of Supreme Court justices from eleven to sixteen, to be appointed by the president. It also stipulated that all other federal judges were to be appointed by the president, rather than ascending via the existing career track, suspended job tenure and transferability protections for judges, and transferred jurisdiction in national security cases to the military courts.

As moderates in the military began to lose ground to hard-liners, they attempted to create a legal structure that protected against excesses of either the right or the left, codifying repressive policies they deemed necessary in order to preclude more arbitrary measures in the future.<sup>47</sup> These changes included a new constitution adopted in 1967 by a Congress from which significant opposition had been excised. This document institutionalized the restrictions placed on the judiciary under Institutional Act No. 2 and gutted courts’ power to review the other two branches of government. Similarly, the Congress was reduced to adjusting bills introduced by the executive. The 1967 Constitution did, however, retain a Bill of Rights purporting to protect individual guarantees such as *habeas corpus*, the inviolability of a person’s home, the right to a defense and jury trial, and the rights of assembly, association, and freedom of expression.

This new legal structure did not forestall the military hard-liners that ascended to power in 1967. Institutional Act No. 5, decreed at the end of 1968, rendered the 1967 Constitution meaningless. This Act intensified military repression by suspending constitutional guarantees indefinitely, including the suspension of *habeas corpus* in all cases of political crimes against national security, and eliminating judicial recourse for those charged under any provision of the new Act. These measures reflected, in part, the military’s response to the Supreme Court’s granting of writs of *habeas* for eighty-one jailed students.<sup>48</sup> The Executive later wielded this Act to dismiss judges.<sup>49</sup>

Decrees in 1969 further weakened the judiciary. A constitutional amendment eviscerated Brazil’s lower courts by allowing the Attorney General to

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46. SKIDMORE, *supra* note 41, at 46. For example, the STF upheld *habeas corpus* petitions of civilian political figures who had been imprisoned on the basis of the threat that their conduct allegedly posed to “external security.” Taking a positivist stance, the Court determined that the conduct at issue could not threaten “external security” unless the defendant was proved to be an agent of a foreign country. In response, the military rulers simply amended the statute to replace the term “external security” with “national security.” Osiel, *supra* note 42, at 533-34.

47. For more detail on the military’s moderate faction, led by Castelo Branco, and the legal structure it imposed, see SKIDMORE, *supra* note 41, at 46-58.

48. *Id.* at 81. The STF released the students on December 10 and 11; President Costa e Silva issued Institutional Act No. 5 on December 13.

49. SKIDMORE, *supra* note 41, at 188.

transfer cases commenced in any court to the Supreme Court if order, health, security, or public finances were at risk.<sup>50</sup> In addition, the government forced three Supreme Court justices to retire early that year, causing the STF president to resign in protest. A sixth Institutional Act reduced the Court from sixteen to its original eleven justices and put all crimes against national security or the armed forces within the jurisdiction of the Supreme Military Tribunal and the lower military courts.<sup>51</sup>

By 1969, the popular political participation that had existed a decade earlier had been eliminated. The use of torture on political prisoners was routine, and death squads operated with impunity. With the rise to the presidency of General Emílio Garrastazú Médici, in October 1969, the hard line became more firmly entrenched. Yet, government lawyers continued to amend the Constitution to provide legal justification for the executive's expanding powers. The Médici regime decreed an amendment to the 1967 Constitution giving the executive enormous powers to protect national security and restricting civil liberties and the rights of political organization.<sup>52</sup> From 1969 and 1973, violence between armed opposition organizations and repressive forces of the state escalated.

Despite increasing levels of repression, Médici gained some level of popularity for presiding over Brazil's economic "miracle." From 1968 to 1974, the gross domestic product (GDP) rose at an annual average rate of nearly eleven percent. This economic boom lent an air of legitimacy to the regime among the middle class.<sup>53</sup> The poor, however, lost economic ground as distribution from the benefits of growth became increasingly unequal.

After General Ernesto Geisel assumed power in 1974, repression was slowly lifted. With indications that Geisel favored gradual liberalization, organizations in civil society began pushing for change. The Brazilian Bar Association (*Organização dos Advogados Brasileiros*, OAB) took a leading role in challenging the military government. Bar opposition to the regime was socially and politically significant given the elite status of lawyers and the Bar in Brazilian civil society.<sup>54</sup> Members of the Bar pressed for a return to the rule of law.

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50. ROGÉRIO BASTOS ARANTES, *JUDICIÁRIO E POLÍTICA NO BRASIL* 99-100 (1997).

51. SKIDMORE, *supra* note 41, at 82.

52. *Id.* at 109. Médici enacted this measure shortly after armed opposition groups kidnapped the U.S. ambassador to Brazil. For a detailed account of the kidnapping episode, see SKIDMORE, *supra* note 41, at 101-04.

53. SKIDMORE, *supra* note 41, at 138.

54. Law training has traditionally been the path to public power in Brazil. The dominant position of law and lawyers, "initially a product of colonial times, was quite evident also by the time of the First Republic at the end of the 19th century . . ." YVES DEZALAY & BRYANT GARTH, *POLITICAL CRISES AS PROFESSIONAL BATTLEFIELDS: TECHNOCRATIC AND PHILANTHROPIC CHALLENGES TO THE DOMINANCE OF THE COSMOPOLITAN LAWYER-STATESMAN IN BRAZIL*, American Bar Foundation Working Paper No. 9612 at 7 (1996). The political influence of lawyers is evident by looking at their numbers in government. "Between 1831 and 1840, 56.6% of cabinet ministers and 71.4% of senators were law graduates. Between 1871 and 1889, these proportions increased to 85.7% and 71.7%, respectively. In the congress elected in 1982, 60.6% of the 479 deputies held bachelor of law degrees." Joaquim Falcão, *Lawyers in Brazil*, in Vol. 2, *THE CIVIL LAW WORLD* 400, 412 (Richard L. Abel & Philip S. C. Lewis, eds. 1988) (citations omitted). Characteristic of Brazilian lawyers is a strong commitment to liberal political ideals that often plays a role in moments of political transition. *Id.* at 412. The OAB, for example, initially supported the military overthrow

In particular, they urged for an accounting of missing activists and began defending a larger numbers of political prisoners. They also protested against the use of torture and arbitrary police action, demanded the repeal of repressive legislation, and pushed for the reinstatement of *habeas corpus* for political crimes and respect of political, civil, social, and economic rights.<sup>55</sup>

Geisel allowed controls over the judiciary to remain in place, probably to placate hard-liners leery of liberalization. In 1977, he crafted a "judicial reform" amendment to the Constitution, which Congress rejected. Two days after the failed vote, Geisel closed Congress under the extraordinary powers to govern by decree given to the Executive by Institutional Act No. 5. Within two weeks, Geisel, again by decree, issued the original version of the "judicial reform" amendment previously discarded by Congress. The measure created a Council of Judges (*Conselho da Magistratura*) to discipline errant judges and removed trials of military police from the jurisdiction of civil courts, establishing special military tribunals.<sup>56</sup> The OAB vehemently opposed these measures.

By the end of the following year, however, Geisel nominally restored judicial independence. A constitutional amendment reinstated guaranteed tenure for judges and depoliticized decisions over judges' salaries and court assignments.<sup>57</sup> It also abolished Institutional Act No. 5 and, among other measures, reinstated *habeas corpus* for political prisoners.

Geisel sustained Brazil's economic growth, although not at the high rates experienced during the 1968-1973 "miracle." Between 1974 and 1978 the GDP grew at an average annual rate of seven percent. Nevertheless, inflation doubled, reaching an average of 37.9% between 1974 and 1978, compared to the average of 19.3% between 1968 and 1973.<sup>58</sup> The 1973 oil price shock threw Brazil's balance of payments off kilter, prompting heavy reliance on foreign loans.

Geisel's handpicked successor, João Batistade Oliveira Figueiredo, assumed the presidency in 1979, vowing to continue the liberalization process (*abertura*) initiated by Geisel. During his early years in office, Figueiredo's record was mixed, although he did oversee the introduction of an important amnesty bill. The legislation, approved by Congress in 1979, gave amnesty to individuals imprisoned or exiled for political and "connected" crimes (including torture) and allowed judges and other public employees who had been purged

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of President Goulart, based on a sense that the military would better preserve the rule of law. See Eliane Botelho Junqueira, *The Brazilian Bar Association in the Struggle for Human Rights 2* (1998) (unpublished manuscript on file with author). By 1972, however, the OAB began to perceive that military rule threatened the legal order. In a statement issued that year, the officers of the Bar proclaimed that "the most important cause for our country is the primacy of law" and went on to warn the generals of the importance of liberty and justice. SKIDMORE, *supra* note 41, at 186.

55. For a more complete analysis of the role of the OAB, see MOREIRA ALVES, *supra* note 40, at 160-62 and Junqueira, *supra* note 54.

56. MOREIRA ALVES, *supra* note 40, at 149.

57. SKIDMORE, *supra* note 41, at 203.

58. *Id.* at 206-07.

for political reasons to return to their jobs, pending the decision of a special investigation committee.<sup>59</sup>

Recession, however, was the most prominent theme of Figueiredo's administration. By 1982, the Brazilian economy was in shambles—GDP declined sharply, unemployment spiked, and inflation reached unprecedented levels.<sup>60</sup> Having now lost any legitimacy based on economic performance, the regime was subjected to vehement calls for direct presidential elections spurred in large part by the active lobbying of the Bar Association.

The deteriorating situation of Brazil's burgeoning poor population also fueled protest. Income inequality grew substantially between 1960 and 1970. Although data are less conclusive from 1970 to 1980, "income concentration probably continued . . ."<sup>61</sup> By 1981, unemployment stood at 12.3% of the working-age population. An additional eighteen percent were under-employed, earning meager sums as street vendors, window washers, or by other means.<sup>62</sup> This economic downturn is further exemplified by the fact that in 1983, approximately seventy percent of the population had a minimum daily caloric intake below that necessary for human development.<sup>63</sup>

Within this context of inequality, initial steps toward political liberalization and mounting calls for full democracy, judges in the southern part of the country formed the Association of Judges for Democracy, known as the "movement of alternative judges."<sup>64</sup> This group, created in the second half of the 1980s, coalesced around the principle of "alternative use of law," which advocated interpreting laws to serve the interests of oppressed classes. The movement became more well-known in the early 1990s, and adherents attributed a range of different meanings to the practice.<sup>65</sup> A shared fundamental principle of the movement was to regard judicial impartiality and neutrality as a myth. A mild interpretation suggests that alternative law advises judges to consider the social and historical context in which they are applying the law.<sup>66</sup> A more dogmatic

59. *Id.* at 217-19. The law did not grant amnesty to those involved in the armed struggle and charged with what the government referred to as "blood crimes." MOREIRA ALVES, *supra* note 40, at 211.

60. In 1983, GDP declined by 5%, unemployment was 15% higher compared to 1978 averages in Rio de Janeiro and São Paulo metropolitan regions, and inflation hit 211%. See SKIDMORE, *supra* note 41, at 238.

61. *Id.* at 286.

62. MOREIRA ALVES, *supra* note 40, at 233.

63. *Id.* at 234. Even the army became concerned when it was forced to excuse 45% of registrants from service because they did not meet the minimum weight and height requirements.

64. ELIANE BOTELHO JUNQUEIRA ET. AL., *JUIZES: RETRATO EM PRETO E BRANCO*, 156 (1997). The alternative use of law or alternative law (*direito alternativo*) traces back to post-Fascist Italy and was influenced by the French "*critique au droit*." T. Miguel Pressburger, *Direito, a Alternativa, in PERSPECTIVA SOCIOLÓGICA DO DIREITO, 10 ANOS DE PESQUISA* 21, 25-7 (Ordem dos Advogados do Brasil, Seção do Estado do Rio de Janeiro, 1995).

65. ELIANE BOTELHO JUNQUEIRA, *A SOCIOLOGIA DO DIREITO NO BRASIL* 113 (1993).

66. For example, a former justice of the STF suggested that alternative law is "the interpretation and application of the law according to the historical and social transformations incessant in the world in which we live." B. CALHEIROS BOMFIM, *A CRISE DO DIREITO E DO JUDICIÁRIO* 28 (1998) (quoting Justice Evandro Lins e Silva, one of the STF justices purged by the military regime in 1969).



interpretation posits that judicial power ought to be rallied to the service of the poor masses in their struggles.<sup>67</sup> Detractors argue that alternative law will lead to anarchy because it encourages judges to consider themselves to be above the law and the sole interpreters of popular will.<sup>68</sup>

As judges attempted to reverse particular effects of military rule, a constituent assembly sought to do the same through the creation of a new constitution. The Congress elected in 1986, including then-Senator Fernando Henrique Cardoso, convened in unicameral mode in 1987 as the National Constituent Assembly in order to draft a new constitution. This Constitution was adopted in 1988 and continues to be in force.

The new constitutional scheme places the judiciary in a prominent position to protect the nascent democratic system. Although the drafters shunned major political reforms, they attempted to embody in the Constitution “democratic safeguards against a possible return of authoritarianism in a number of institutional features, most notably: . . . the adoption of an extensive and detailed Bill of Rights [and] the expansion of constitutional guarantees for the judicial protection of fundamental rights . . .”<sup>69</sup> Section two discusses these features in more depth.

The 1988 Constitution also created a new tier of federal courts. In order to decongest the Supreme Court, the Constitution creates five regional federal appellate courts on an intermediate level, directly above the trial courts. Additionally, the new Constitution replaced the former general federal appellate court with the new Superior Tribunal of Justice (*Superior Tribunal de Justiça*, STJ) to sit between the regional appellate courts and the Supreme Court. The STJ is allotted much of the jurisdiction formerly apportioned to the Supreme Court.<sup>70</sup>

The 1988 Constitution continued the division of the Brazilian judicial system into federal and state courts. Courts are further organized into those that administer “common justice”—separated into criminal and civil courts—and those that administer “specialized justice”—divided into labor, military, and electoral courts. Specialized courts operate only on the federal level. Common courts include state-level trial courts and one state-level appellate court, with appellate recourse to one or two levels through the higher federal courts. Many states also operate small claims courts, called “special courts.” Cases involving the federal government are handled in the “federal justice” courts, which comprise a trial level court sitting in each state, the new regional appellate courts, and two additional layers of federal appellate courts: the STJ, for ordinary matters, and the STF, for constitutional matters and extraordinary appeals.<sup>71</sup>

67. JUNQUEIRA, *supra* note 65.

68. José Roberto Lino Machado, *Democracia e Justiça Alternativa*, 2 JÚZES PARA A DEMOCRACIA 2 (Oct. 1994). One legal academic with whom I spoke referred somewhat critically to the alternative law philosophy as the “liberation theology” of judges. Interview with José Luis Carvalho, Economics Professor, University of Santa Ursula, Rio de Janeiro, Braz. (June 9, 1998).

69. Marcus Faro de Castro, *The Courts, Law, And Democracy in Brazil*, 152 INT’L SOC. SCI. J. 241 (1997).

70. ARANTES, *supra* note 50, at 98, 106.

71. *See, e.g.*, Falcão, *supra* note 54, at 412.

The Constitution stipulates that most judges enter the profession by means of a public examination.<sup>72</sup> One-fifth of the judges in the federal regional courts and in the state, territorial, and Federal District courts must be drawn from the ranks of lawyers in the public ministry or members of the Bar Association.<sup>73</sup> Promotion is based on seniority and merit.<sup>74</sup>

The Brazilian judiciary is largely young and male. The average age of judges when they enter the judicial career is becoming progressively lower. In the group of judges that entered the career in 1981-82, less than thirty percent were age thirty or younger, compared to fifty-two percent ten years later.<sup>75</sup> Currently, the average age of judges is forty-two. Approximately eighty-one percent of judges are men, representing a gradual decrease as women have more successfully accessed judicial positions.<sup>76</sup> Statistics on race in the judiciary are difficult to secure.<sup>77</sup> However, anecdotal evidence suggests that judges are overwhelmingly light-skinned. Likewise, the socio-economic background of judges is difficult to pinpoint. At the end of the 1970s, about twenty percent of new judges had fathers with university degrees. In the 1990s, this figure doubled.<sup>78</sup> Brazilian sociologists have concluded that this and other data suggest that the lower classes are becoming less represented in the judiciary.<sup>79</sup>

#### IV.

##### SETTING THE STAGE FOR JUDICIAL REFORM

The Brazilian government's pursuit of globally oriented economic policies is shaping Cardoso's choice of judicial reform measures. This is true in large measure because features of Brazil's legal system and culture pave the way for that influence. Specifically, Brazil's Constitution holds the judiciary responsible for protecting broad new social and individual rights. Seizing on the new rights and remedies prescribed in the Constitution, Brazilians have challenged severe economic and state reform measures, sometimes winning the sympathy of so-

72. BRAZ. CONST. art. 93, sec. I. The exam is considered to be exceptionally difficult. In 1994, 3,300 candidates registered for the exam in the state of São Paulo. Only 41 were approved. MARIA DA GLORIA BONELLI, PROFESSIONAL COMPETITION IN THE BRAZILIAN JUDICIAL WORLD, at 4 (American Bar Foundation Working Paper No. 9609, 1997).

73. BRAZ. CONST. art. 94. The Bar and the association representing government lawyers each present to the court a list of six names of lawyers who each have at least 10 years of professional experience. The court reduces the lists to three each and forwards the names to the Executive, who selects one for appointment. *Id.*

74. BRAZ. CONST. art. 93, sec. II. Merit is based on "criteria of promptness and reliability in administering justice and by performance in recognized extension courses." *Id.* at sec. II (c).

75. LUIZ WERNNECK VIANNA ET AL., CORPO E ALMA DA MAGISTRATURA BRASILEIRA 67, Table 1.5 (1997). The director of a school to prepare lawyers for the entrance exam said that most lawyers applying for judgeships are between 25 and 30 years of age. Manoel Carpena Amorim, *Os Jovens Juízes*, JORNAL DO BRASIL, June 19, 1998, at 9 (authored by the director of the *Escola da Magistratura do Estado do Rio de Janeiro*).

76. WERNNECK VIANNA ET AL., *supra* note 75, at 69 (reporting and interpreting the results of a survey of almost 4,000 state and federal judges from around the country).

77. Interestingly, one of the most comprehensive surveys of judges, intending to portray the "heart and soul" of the Brazilian judiciary, reported no information regarding race. *Id.*

78. *Id.* at 88.

79. *Id.* at 101.

cially oriented judges inclined to favor the interests of injured plaintiffs over the government's reform initiatives. The combined result of these actions has led to overburdened courts and judicially imposed impediments to the government's goal of fully integrating with the global economy. The remainder of this section examines the three factors that give rise to Cardoso's judicial reform initiatives: the impact of the 1988 Constitution on courts; the government's economic overhaul program; and how judges have responded to increased political use of the courts.

#### A. Expanded Rights and Remedies in the 1988 Constitution

The 1988 Constitution was drafted at a time when the belief in the transformative power of law was at its height and the Brazilian government played a central role in ordering economic and social development. The government was heavily involved in strategic sectors of the national economy and the military regime had recently ceded power in the face of broad-based opposition demanding a return to the rule of law and popular participation in government. The new Constitution reflected this climate by adopting statist provisions, such as guaranteed job stability in the public sector, restrictions on foreign ownership in key sectors of the economy, and provisions to enhance the role of the judiciary by creating new rights and remedies that essentially invite civil society to monitor government action.

The drafters followed a directed (*dirigiste*) model in creating a constitution that does more than organize power; it prescribes a program intended to produce profound political, economic, and social transformation.<sup>80</sup> The range of social rights, for example, includes education, leisure, employment, and the protection of motherhood and childhood.<sup>81</sup> It is rife with non-self-executing provisions, requiring complementary legislation to become operational.

Under the new Constitution, the judiciary is in a pivotal position to ensure that the Constitution's plans and programs are implemented. To trigger the exercise of judicial power, the Constitution outlines broad remedies with liberal standing rules. The Constitution empowers individual citizens, unions, political parties, and other associations to initiate law suits against the government with relative ease (provided that litigants possess the requisite financial resources).

The Constitution allots to the judiciary the authority to enforce constitutional rights that are self-executing. Judges are granted the power to "declare laws or normative acts of the Government unconstitutional only by an absolute majority of their members [of the court] or of the members of their respective special body."<sup>82</sup> It also provides remedies through which judges can compel the

80. Manoel Gonçalves Ferreira Filho, *Fundamental Aspects of the 1988 Constitution*, in A PANORAMA OF BRAZILIAN LAW 13-14 (1991).

81. BRAZ. CONST. art. 6. The section entitled "Fundamental Rights and Guarantees" is nearly nine and one half pages, including chapters on "Individual and Collective Rights and Duties," "Social Rights," and "Political Rights." BRAZ. CONST. Title II.

82. BRAZ. CONST. art. 97. In theory, since the first constitution was adopted in 1891, Brazilian courts have operated within a system of decentralized review, under which the entire judiciary is entrusted with powers of judicial review of legislative acts. The military regime, however, effec-

government to effectuate non-self-executing constitutional promises. Judges, for example, may issue a mandate of injunction (*mandado de injunção*) “whenever lack of regulations makes exercise of constitutional rights and liberties and the prerogatives inherent in nationality, sovereignty and citizenship infeasible.”<sup>83</sup> Likewise, the newly expanded direct action of unconstitutionality (*ação direta de inconstitucionalidade*) gives the Supreme Court original jurisdiction to declare “a lack of measures to make a constitutional rule effective” and to notify the appropriate branch of government to adopt the necessary measures. The Constitution expands the categories of groups and individuals with standing to petition the Supreme Court for this review to include the president, federal and state legislatures, state governors, the federal procurator-general, the Bar Association, political parties, and union confederations.<sup>84</sup>

Additional remedies also enhance judicial power and potentially place the courts in the center of political controversies by granting standing to individuals, groups, and associations to challenge government policies. For example, the new collective writ of security (*mandado de segurança coletiva*) allows a political party, a union, a class entity, or an association in operation more than one year to protect the rights of its members.<sup>85</sup> The Constitution also extends the scope of the popular action (*ação popular*) procedure that gives standing to any citizen to defend the “public patrimony.” Citizens can now sue to annul an act injurious of “administrative morality, to the environment, and to historical and cultural monuments.”<sup>86</sup> Finally, the Constitution allows for *habeas data*, a new procedural remedy allowing anyone to “discover the information the government has about him in its data banks and to rectify that information if it is incorrect.”<sup>87</sup>

### B. New Strategy for Economic Growth

Shortly after the adoption of the Constitution, Brazilian policymakers began to radically transform Brazil’s economic growth strategy. This shift eventually focused more attention on courts because it combined with the new rights and remedies in the 1988 Constitution to prompt Brazilians to dispute economic and state reform measures through litigation. The way in which courts have responded is a factor contributing to Cardoso’s judicial reform agenda.

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tively centralized the power of judicial review in the Supreme Court by slashing the jurisdiction and eroding the independence of lower courts.

83. BRAZ. CONST. art. 5, sec. LXXI. This novel provision is intended to overcome legislative inertia by protecting unregulated constitutional rights. The STF has interpreted this provision narrowly: the Court cannot rectify the legislative or regulatory omission, it can only point out the existence of the omission. The provision bears little resemblance to the injunction remedy available under English and U.S. law.

84. BRAZ. CONST. art. 103. For a more complete description of this procedure, see *infra* notes 199 and 200 and accompanying text.

85. BRAZ. CONST. art. 5, sec. LXX.

86. BRAZ. CONST. art. 5, sec. LXXIII. This mechanism also exempts plaintiffs from court costs and, if they lose, from the burden of paying the prevailing party’s attorneys’ fees and costs. *Id.*

87. Keith S. Rosenn, *1988 Constitution of the Federative Republic of Brazil: Annotated English Translation*, in A PANORAMA OF BRAZILIAN LAW 383, 389 n.5 (1992) (discussing BRAZ. CONST. art. 5, sec. LXIX).

Beginning in the 1930s, Brazil pursued an economic growth strategy, along with much of the Western Hemisphere, that put the state in a central role to direct and promote the economy. The government maintained high tariffs to protect national entrepreneurs, subsidized certain products, fixed prices on some commodities, and exercised monopolistic control over strategic sectors of the economy. Brazil's military regime adhered to this regulatory state model, but when it ceded power, it left behind a legacy of recession, spiraling inflation, and a growing fiscal crisis. Lacking the necessary tools to address serious economic problems, the civilian administration of José Sarney further exacerbated economic problems between 1985 and 1989.<sup>88</sup>

By 1990, after six decades of striving for growth based on inward-focused economic policies, Brazilian leaders began looking more towards the global market for development opportunities. Since then, Brazilian society has been steeped in enormous and fast-paced economic shifts designed to dismantle the regulatory state and embrace an economic liberalization tack reflecting the dominant paradigm in development thinking around the world. Exemplifying the degree to which Brazilian leaders feel compelled by global pressures to adopt this strategy, one of Cardoso's cabinet members stated, "The market gained much more space at a world-wide level and transformed international competitiveness into a condition determining the survival of the economic development of each country."<sup>89</sup> Reform measures have focused on gaining macro-economic stability, developing markets and related institutions, deregulating economic activity, promoting regional and international trade, and facilitating the free flow of investment—all of which are intended to enhance Brazil's position in the global market.

The Collor government (1990-92), opened the steel and petrochemical industries to privatization and attempted to shrink the state's chronic deficit by reducing the civil service.<sup>90</sup> President Franco (1992-94), who appointed Cardoso as his finance minister, secured temporary tax and fiscal reform to support currency stabilization measures of the March 1, 1994, common value reference unit (URV) and the July 1, 1994, Real Plan.

President Cardoso took office January 1, 1995, and launched a reform agenda based on a linear sequence in which he gave first preference to economic reforms. In particular, Cardoso recognized that quick liberation of the restrictions on foreign capital and the strict national monopolies was necessary to at-

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88. The current account deficit took a nosedive following implementation of a new provision in the 1988 Constitution that redivided the national tax base. The level of revenue transfers from the federal government to state and local governments increased, leaving fewer revenues for the federal government without a commensurate transfer of federal programs to states. David Fleischer, *The Cardoso Government's Reform Agenda: A View from the National Congress, 1995-1998*, 40 J. INTERAMERICAN STUDIES & WORLD AFFAIRS 119 (1998).

89. LUIZ CARLOS BRESSER PEREIRA, STATE REFORM IN THE 1990S: LOGIC AND CONTROL MECHANISMS, 15 (1997) (expounding on the Brazil's state reform plan, as devised and administered by the Ministry of Federal Administration and State Reform, headed by Bresser Pereira).

90. For a review of the laws providing the structure for privatizing state-owned enterprises, see Carlos Alberto Longo, *The State and the Liberalization of the Brazilian Economy*, in BRAZIL: THE CHALLENGES OF THE 1990s, 36, 50-51 (1993).

tract foreign investment—crucial to sustaining the economy during the transition to the Real Plan.<sup>91</sup> Deficit reduction through tax reform also figured prominently. The second wave of reforms focused on administrative changes to the state bureaucracy in an effort to stem the hemorrhaging national treasury. Specifically, this politically difficult agenda included a reduction of the civil service, abolition of superfluous agencies, and reform of the public social security system.<sup>92</sup>

Toward the latter part of the 1990's, economic indicators reflected the benefits of this free market trajectory. Inflation plummeted from 3000% in 1994 to 3% in 1998. Foreign investment and reinvestment rose from just over \$35 billion in June 1991 to \$58 billion in June of 1995.<sup>93</sup>

Economic policies pegged to a single global market may represent a sound strategy for growth in Brazil, as the prevailing development model suggests. Nonetheless, strains of this strategy run contrary to Brazil's tradition, embedded in the 1988 Constitution, of a strong government. Furthermore, some of its prescriptions pose hardships for nearly all sectors of society. Despite beneficial results and future growth potential, economic restructuring to meet the demands of a global economy exacted a toll on Brazilian society. For example, the average rate of unemployment in the country was 3.42% in December 1994. By the end of 1998, the unemployment rate in São Paulo, the industrial heart of Brazil was about 19%.<sup>94</sup> Minimum monthly wages dropped from US\$88.50 in 1988 to US\$64.22 in 1990, with a small recovery in 1993 to US\$74.33.<sup>95</sup> During the last quarter of 1998, the budget deficit ballooned to 7.2% of the gross national product.<sup>96</sup> In late 1998, a run on currency reserves forced a devaluation, further exacerbating unemployment.

Diminishing the role of the state in favor of market forces and the private sector has also meant scaling back the state's social welfare function. Although Brazil had not become a "welfare state," as the term is understood in a European sense, certain social rights fell victim to neoliberal economic trends. For example, new economic policies opened up insurance, education, health care, and transportation to private capital, allowing the government to begin reducing its investment in social programs.<sup>97</sup> This "depoliticization of social transformation" contributes to the "dramatic growth of poverty and social inequality across

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91. See, generally, Fleischer, *supra* note 88.

92. Civil service pensions are feeding Brazil's fiscal crisis and are expected to run a \$35 billion deficit in 1999. Diana Jean Schemo, *Brazil's Austerity Plan Clears Important Hurdle on Pension Coast*, N.Y. TIMES, Nov. 6, 1998, at A12.

93. BOLETIM DO BANCO CENTRAL DO BRASIL, SUPLEMENTO ESTATISTICO, DEZEMBRO 1997, p. 351. Over \$19 billion of the 1995 amount came from U.S. investment.

94. Diana Jean Schemo, *On Election Eve, Doubts Cloud Brazilians' Outlook*, N.Y. TIMES, Oct. 2, 1998, at A3.

95. Armando Boito, Jr., *Neoliberal Hegemony and Unionism in Brazil*, 25 LATIN AMERICAN PERSPECTIVES 71 (1998) (reporting monthly minimum wage figures in 1993 dollars).

96. Diana Jean Schemo, *Possible I.M.F. Bailout Stirs Brazilians' Bitter Memories of 80's*, N.Y. TIMES, Oct. 1, 1998 at A19.

97. Boito, Jr., *supra* note 95, at 71.

the globe, as well as the gradual erosion of the fragile safety nets once provided by the welfare state no matter how incomplete or embryonic.”<sup>98</sup>

### C. Effect on the Judiciary of the New Constitution and Economic Policy Shifts

Armed with new procedures for vindicating the broadly stated rights of the 1988 Constitution, individual citizens, unions, and political parties flooded the courts with claims related to economic and state reform measures in an effort to mitigate their harsh effects.<sup>99</sup> One of the ramifications of this onslaught has been a huge increase in the number of cases in Brazilian courts, exacerbating the problem of delay. Perhaps a more prickly result of these suits is that political use of the courts provides socially oriented judges with the opportunity to derail economic and state reform measures. Cardoso’s judicial reform agenda addresses both of these results.

#### 1. Increasing Court Delay

On average, it takes 1,500 days for the Brazilian courts to resolve a case.<sup>100</sup> Those most anxious about delay tell the story of the case in which two soccer teams disputed the 1907 Rio de Janeiro state championship title. The case was finally decided in 1996.<sup>101</sup>

The problem of delay stems from the widening gap between the number of court cases and the number of judges and courts. During the past decade, there has been an enormous increase in the number of cases filed. In 1989, Brazil’s highest court received 9,632 cases.<sup>102</sup> This number nearly doubled in 1990, the year of Brazil’s first direct democratic presidential election.<sup>103</sup> In 1997, 33,963 cases were filed in the STF.<sup>104</sup>

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98. Santos, *supra* note 18, at 29-30.

99. The success of currency stabilization plans also contributes to Brazilians’ willingness to seek vindication in the courts. Because the Real is relatively stable, some Brazilians find that even disputes involving smaller sums are now worth litigating.

100. Paulo Sergio Pinheiro, *The (Un) Rule of Law and the Underprivileged in Latin America: New Democracies, Uncivil Societies and Non-Access to Justice 9* (Paper presented at the seminar, “Sociedade e a Reforma do Estado,” Ministerio da Administração e Reforma do Estado, Mar. 28, 1998, São Paulo, SP, Brazil. Paper is on file with the author).

101. INSTITUTO DE ESTUDOS ECONÔMICOS, SOCIAIS E POLÍTICAS DE SÃO PAULO, *ECONOMIC COSTS OF INEFFICIENCY IN BRAZIL 1* (draft of unpublished paper, Nov. 1997, on file with the author).

102. Carlos Mário da Silva Velloso, *The Judicial Power: How to Make it More Agile and Dynamic—Binding Effect and Other Subjects 10* (unpublished paper based on conference presentation) (Sept. 20, 1997) (manuscript was authored by an STF Justice and is on file with the author).

103. In 1990, 18,549 cases were filed in the STF. *Id.* at 10-11. Faro de Castro, *supra* note 69, at 246 (citing 1995 STF figures as indicating that 16,388 cases were filed in the STF).

104. Velloso, *supra* note 102, at 11 n.11. In 1998, the STF adjudicated 51,086 cases. Carlos Eduardo Lins da Silva, *Tribunal Militar Reage a Idéia de Extinção*, FOLHA DE SÃO PAULO, Mar. 4, 1999, at 9. Statistics for the lower federal courts are similarly stark. In 1989, the five regional appellate courts received a total of 96,021 cases. By 1997, this figure rose to almost 317,000. PODER JUDICIÁRIO, CONSELHO DA JUSTIÇA, DADOS ESTATÍSTICOS: JUSTIÇA FEDERAL DE 1º E 2º GRAUS, 1997, 13 (1998). Federal trial courts received in 1989 over 230,000 cases and in 1997, over 900,000. *Id.* at 29-31.

This explosion of cases is attributable in large measure to “increased social mobilization, channeled through the judicial process, against reform policies which attempted to overcome the economic populism of past governments.”<sup>105</sup> New social rights and judicial remedies embodied in the 1988 Constitution facilitated use of the courts to protest new reforms. The steep rise in the number of cases filed burdens higher courts because Brazil’s system of lenient review allows appeals through at least two levels of appellate courts and a third or fourth, depending on the procedural posture and substantive focus of the case.

While Brazilians are turning to courts in unprecedented numbers, equally impressive numbers of judicial posts remain vacant. Nationally, approximately twenty-five percent of judicial posts are vacant.<sup>106</sup> In some states, nearly fifty percent of judgeships remain unfilled.<sup>107</sup> The growing dearth of judges is attributable in part to the cumbersome career entrance examination which new law graduates are ill-equipped to pass. In addition, a large number of judges began retiring prematurely in 1995, after Cardoso initiated a series of attempts to decrease retirement benefits for public employees. Even if all the judicial posts were filled, Brazil would still have a fairly low ratio of judges to citizens—about one judge for 19,200 inhabitants.<sup>108</sup> However, given the present vacancies, one STF justice estimated that in 1990 the ratio was about one judge for every 25,100 inhabitants.<sup>109</sup> According to data from 1993, this ratio jumped to one judge for every 29,000 Brazilians.<sup>110</sup>

## 2. Lower Court Decisions Impair Economic and State Reform

The political use of courts gives rise to an even thornier situation than the problem of court delay. Some lower courts, both state and federal, are prioritizing local social or individual rights over federal economic goals and issuing decisions that hobble federal reform initiatives.<sup>111</sup> The following section provides more detail on the ways in which courts have issued decisions affecting the implementation of economic and state reform legislation and administrative actions. These examples illustrate the complex interaction among three factors:

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105. Faro de Castro, *supra* note 69, at 242. An STF Justice confirmed that the increase in the number of cases is largely attributable to the government’s economic overhaul measures. Interview with Carlos Mário da Silva Velloso, STF Justice in Brasília, Braz. (June 22, 1998).

106. As of the end of 1997, positions for 733 federal trial judges existed and 203 remained vacant. Out of 101 regional federal judge positions, nine were vacant. PODER JUDICIÁRIO, CONSELHO DA JUSTIÇA, *supra* note 104, at 8.

107. Pinheiro, *supra* note 100, at 10.

108. Velloso, *supra* note 102, at 4. These estimates compare to, for example, one judge for every 3,448 inhabitants in Germany, one for every 7,692 in Italy, and one for every 7,142 in France. Maria Tereza Sadek, *Crise e Reforma do Judiciário no Brasil*, 7 (1997) (unpublished manuscript on file with author).

109. Velloso, *supra* note 105, at 4.

110. Sadek, *supra* note 108.

111. Faro de Castro, *supra* note 69, at 242 (reporting that “[S]uch pressure [against government reform initiatives] often met with judges who were willing to take a more active stance in the face of perceived injustice or resistance to judicial authority. Thus while social pressure channeled [sic] through the judicial process mounted, judges of lower courts often began to take stricter courses of action against the government”).



the post-authoritarian constitution granting broad social rights and judicial remedies; globally condoned economic and state reform measures geared toward ensuring “survival of [Brazil’s] economic development”;<sup>112</sup> and lower court judges grappling in court with national development strategies that are potentially harmful to local social concerns.<sup>113</sup> Cardoso’s judicial reform proposals address the volatile results of this interaction by limiting the power of the lower courts.

a. *Barriers to Privatization*

The sale of *Compania Vale do Rio Doce*, discussed at the outset of this article, provides a vivid example of lower court action related to privatization. But it is not the only privatization action that courts have been asked to prevent or alter. More recently, in July, 1998, individuals and organizations invoked judicial action to block the sale of *Telebrás*, Brazil’s national telephone company.<sup>114</sup> Having been taken by surprise by the legal actions involved in the *Compania Vale do Rio Doce* sale, the government was prepared to battle legal opposition in the sale of *Telebrás*. It conducted training sessions for hundreds of lawyers and made plans to place at least two lawyers at all twenty-seven federal trial courts around the country to avoid having to charter flights to oppose last-minute petitions for injunctions at harder to reach courts, as was necessary prior to the CVRD auction.

b. *Tax Reform Obstacles*

Tax reform has acquired tremendous significance in Brazil, not only as a means of easing the chronic deficit, but also as an indicator of budgetary reform. Tax reforms are vital to securing Brazilian accords with the International Monetary Fund and to assuring potential investors that the country is making progress toward fiscal reform.<sup>115</sup> According to the executive director of the Inter-American Development Bank, “Brazil is set to join the ranks of global economic powers but must sort out its taxation problems before growth can really take off.”<sup>116</sup> As the 1997 economic crisis gripped parts of Asia, tax increases became a key

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112. See BRESSER PEREIRA, *supra* note 89 and accompanying text.

113. These examples are by no means an exhaustive review of lower court decisions related to divisive economic reform measures. They serve only as illustrations of ways in which trial courts have impaired the implementation of economic reform initiatives.

114. See Patury & Sorima Neto, *supra* note 1 (reporting that the government was preparing over 450 lawyers to handle suits against the *Telebrás* auction); *Telebrás I*, *JORNAL DE BRASILIA*, June 22, 1998, at 2 (reporting that the Attorney General’s office was preparing 670 lawyers for the anticipated onslaught of cases seeking to prevent the *Telebrás* sale).

115. In October 1998, for example, Brazilian government officials met in Washington with IMF officials and set forth a blueprint for raising US\$14 billion in tax revenue by creating new taxes and increasing existing ones, in the hopes of securing IMF assistance. Diana Jean Schemo, *Brazil Plans \$20 Billion in Tax Hikes*, *Budget Cuts*, N.Y. TIMES, Oct. 17, 1998, at A4.

116. Angus MacSwan, *Brazil Tax Reform Urged by International Banker*, REUTERS FINANCIAL SERVICE, Jan. 30, 1997 (citing Ronald Scheman’s speech to Miami’s Brazilian-American Chamber of Commerce).

instrument of the Cardoso government's attempt to shore up confidence that Brazil would not devalue its currency.<sup>117</sup>

Many tax measures have been challenged through legal channels. Lower courts frequently impose preliminary injunctions against the collection of taxes they deem unconstitutional or illegal, thwarting the myriad purposes for new tax measures. Court challenges to taxes have more than once derailed President Cardoso's budget planning, both while he was Finance Minister and more recently during his presidency.

As Finance Minister, Cardoso designed a tax on financial transactions that courts later struck down.<sup>118</sup> In recent years, his administration supported a similar tax that has also met with opposition. Cardoso took extreme measures to salvage this recent tax from detrimental lower court decisions, including firing the entire board of one of the largest government-controlled banks after bank executives sought a court order to free the institution from having to pay the tax on financial transactions.<sup>119</sup>

Adjustments to corporate taxes supporting the social security fund, in particular, have garnered innumerable preliminary injunctions.<sup>120</sup> Various income tax measures, such as a cap on deductions for educational expenses, also have been derailed by lower court injunctions.<sup>121</sup> Even if the STF upholds a tax, lower courts have, at times, continued to issue preliminary injunctions impairing collection of the tax.<sup>122</sup>

### c. *Impediments to Monetary Reform*

Upon entering office in January 1990, President Collor promulgated monetary reform measures through a series of executive decrees. This sequence of new monetary plans also drew protesters to court, resulting in lower court deci-

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117. In November 1998, Brazil negotiated a \$41.5 billion aid package with the International Monetary Fund to prop up its economy in the aftermath of the 1997 Asian economic crisis. At a time when support for economic reform was waning, this agreement placed additional pressure on the Cardoso government to comply with fiscal conditions attached to the loan. To ensure loan disbursements, Brazil pledged to meet ambitious revenue targets through harsh spending cuts and tax increases, both of which Cardoso continues to have difficulty securing from Congress. See, e.g., Schemo, *supra* note 115; Richard W. Stevenson, *Brazil is Warned to Clean Up Its Economic Act*, N.Y. TIMES, Jan. 16, 1999, at B1, 4.

118. Only a few months later, Cardoso's colleague in the Senate, Nelson Jobim, who later became his Minister of Justice and an appointment to the STF, first raised the idea of binding precedent, one of Cardoso's key judicial reform proposals, in the Senate. Interview with Nelson Jobim, STF Justice, in Brasília, Braz. (June 26, 1998).

119. Simon Romero, *Brazil Ousts Bank Board That Opposed Tax*, N.Y. TIMES, June 24, 1999, at C4. One observer, commenting on the Banco do Estado de São Paulo's court action, stated that "[y]ou don't want people questioning this tax in the courts." *Id.*

120. *STF Não Reconhece Tributo fora da Lei*, JOURNAL DO COMMERCCIO, August 18, 1995, at 22 (citing, in particular, taxes paid to the Program of Social Integration and "the contribution for the financing of social security" (COFINS)).

121. *Brazilian Treasury to Appeal against Income Tax Injunction*, GAZETA MERCANTIL INVEST. NEWS, Apr. 23, 1997 (LEXIS). At least one lower court judge defeated the new cap, allowing taxpayers unlimited deductions.

122. *Emenda Tenta Unificar Decisões do Judiciário*, JORNAL DE BRASÍLIA, Feb. 12, 1995, at 3 (referring to lower court injunctions against COFINS taxes previously upheld by the STF).

sions impairing the implementation of some of the measures. For example, lower courts attempted to impose injunctions against specific features of President Collor's inflation-fighting "Collor Plan."<sup>123</sup> On March 15, 1990, Collor froze Brazilians' savings accounts for eighteen months, denying access to any amount over US\$1,000.<sup>124</sup> The measure was widely regarded as a flagrant violation of the 1988 Constitution and is estimated to have prompted the filing of thousands of court cases.<sup>125</sup> Initial lower court decisions were favorable to claimants, threatening to sidetrack Collor's new monetary package. Three days following his introduction of the freeze, Collor issued another executive decree prohibiting courts from granting preliminary injunctions against any earlier decrees relating to the Collor Plan.<sup>126</sup>

In January 1991, Collor launched a second currency stabilization effort instigating measures with a high social cost—a sharp hike in public-sector prices, a freeze on wages and prices, and changes to the rules governing financial markets. In the aftermath of these measures, a number of lower federal courts ruled that the executive branch needed to fully adjust social security benefits and pensions for inflation. Collor convened an extraordinary session of Congress to pass a bill increasing employee taxes and contributions to social security. Lower courts tossed out the measure.<sup>127</sup>

#### *d. Other Restraints Presented by Lower Court Rulings*

There are other extreme examples of lower court reaction to perceived injustices. One bold judicial decision resulted in the 1992 imprisonment of the president of the Brazilian Social Security Service for refusing to comply with a court-ordered increase in retirees' pensions.<sup>128</sup> In another decision, a judge prohibited the Brazilian Central Bank from implementing a financial reorganization program designed to prevent a major crisis in the banking industry.<sup>129</sup> A second

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123. In the 1988 Constitution, the president retains extensive decree powers through the mechanism of a "provisional measure" (*medida provisoria*). The provisional measure mechanism allows the president to issue legislation by decree in "urgent" situations; such legislation becomes effective immediately. The measure loses effect after 30 days if it is not approved by Congress. The president has, however, continued to renew provisional measures every 30 days. BRAZ. CONST., arts. 63, 84, sec. XXVI.

124. Provisional Measure 168 (1990).

125. Observers attribute the enormous increase in case filings from 1990 to 1991 in urban areas to complaints against the Collor Plan. In 1990, 75,314 cases were filed in the São Paulo federal trial courts. The following year, this figure catapulted to 339,859. In Rio de Janeiro federal trial courts, 56,721 cases were filed in 1990, compared with 106,419 in 1991. PODER JUDICIÁRIO, CONSELHO DA JUSTIÇA, *supra* note 104, at 63.

126. Provisional Measure 173 (1990). The reaction of the STF to petitions for abstract review of both the initial decree freezing accounts and the subsequent ban on injunctions is, in itself, an interesting study of political jurisprudence that is beyond the scope of this article. The STF avoided determining the constitutionality of the decrees by relying on various procedural grounds to refuse to hear petitions for review. Accordingly, the STF's inaction saved it from having to denounce the first democratically elected president in 25 years, who had just entered office with a public approval rating of over 70% and a mandate to defeat inflation.

127. Carlos Alberto Longo, *The State and the Liberalization of the Brazilian Economy*, in BRAZIL: THE CHALLENGES OF THE 1990s, 36, 44, 48 (1993).

128. Faro de Castro, *supra* note 69, at 242.

129. *Id.*

bank regulation issue prompted a series of cases that led then-president of the STF, Minister Octávio Galotti, to proclaim support for binding precedent. In one case, the Worker's Party petitioned the STF for abstract review of an executive decree intended to facilitate bank mergers. The STF sided with the federal government in support of the decree. One week later, the STF dismissed a Worker's Party case regarding the bank merger measure brought to that court as an ordinary appeal. Three days following that decision—the second definitive STF proclamation supporting the executive decree—a federal trial court judge suspended implementation of the decree.<sup>130</sup>

*e. Alternative Law as a Factor in Court Decisions Impeding Economic Reform*

Lower court decisions blocking the implementation of economic and state reform measures resonate in the alternative law movement that attracted judges beginning in the latter half of the 1980s.<sup>131</sup> It is not clear that judges rendering decisions contrary to government reform efforts are doing so expressly under the banner of "alternative law." Some judges and academics suggest, for example, that judges do not thoroughly understand the difficult and technical issues presented by cases disputing the validity of economic reform measures.<sup>132</sup> Consequently, judgments sometimes favor the more simple arguments of plaintiffs claiming injury. It is also possible that lower courts are wielding injunctions as weapons in response to the government's criticisms of the judiciary. Nonetheless, evidence exists that judges consider the social context of disputes important to reaching decisions, some in open adherence to the alternative law movement.<sup>133</sup> In a small study of Rio de Janeiro state court judges, 5.7% of the respondents claimed that their decisions are very influenced by alternative law themes. An additional 62.9% declared that a small number of their decisions are influenced by alternative law principles.<sup>134</sup> In another recent study, eighty-three percent of judges surveyed concurred that "the judicial power is not neutral" and that a judge should interpret the law to influence social change.<sup>135</sup> Over twenty-

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130. *STF Defende o Efeito Vinculante*, JORNAL DO BRASIL, Dec. 17, 1995, at 2.

131. See *supra* notes 64-68 and accompanying text.

132. One professor of economics in Rio de Janeiro, for example, has initiated an annual week-long law and economics training seminar for judges, convinced that a number of decisions are based on misunderstanding of economic principles. His syllabus features Portuguese language translations of Milton Friedman's work. Interview with José Luis Carvalho, *supra* note 68.

133. The Civil Code, in fact, instructs that "the judge shall take into consideration the social purposes to which the law is directed, as well as the demands of public well-being" in interpreting legislation. PINHEIRO NETO, *DOING BUSINESS IN BRAZIL* § 1.127 (1999) (citing Law of Introduction to the Brazilian Civil Code, art. 5). In a possible example of this in action, an STF Justice described his practice of judging: "Always when I face a controversial case, I do not immediately look for the dogma of the law. I try to create within my human character, a more adequate solution. It is from this point that I turn to the juridical order to search for the indispensable support that makes the solution viable." WERNNECK VIANNA *et. al.*, *supra* note 75, at 279 n.2 (quoting Justice Marco Aurélio de Mello from an interview published in a popular weekly news magazine, *ISTO É*, in 1996).

134. JUNQUEIRA, *ET AL.*, *supra* note 64, at 157, 207.

135. WERNNECK VIANNA *ET AL.*, *supra* note 75, at 258-59 (relating information gleaned from a questionnaire survey returned by 3,927 federal and state judges as part of a 1995 study).

six percent of these judges expressly agreed that judges should take an active role in reducing social inequalities.<sup>136</sup>

Because of the history of Brazil's alternative law movement, and the fact that some judges continue to adhere to alternative law principles, it is likely that at least a portion of lower court rulings against economic and state reform measures are intended to protect disadvantaged litigants harmed by these measures. Regardless of the underlying rationale of decisions contrary to government reform efforts, these decisions serve to thwart (at least temporarily) the Executive's agenda and draw attention to the adverse social consequences of certain economic restructuring programs. Ironically, such decisions put Cardoso in the position of watching lower courts harness the constitutional provisions that he helped to craft (as a member of the constituent assembly) in order to impair the implementation of his program to make Brazil more competitive on the global market. In response, Cardoso endorsed an agenda to reform the judiciary.

## V.

### JUDICIAL REFORM STRATEGY

For decades, the political agenda of Brazil's presidents has included judicial reform, and President Cardoso's blueprint for governance is no exception.<sup>137</sup> First elected in 1994 and reelected for a second term in 1998, President Cardoso spoke of judicial reform during his election campaigns and has introduced dozens of measures to alter the judiciary.<sup>138</sup> The President has, for example, peddled proposals to install administrative courts to mediate labor disputes, to eliminate lay judges in the labor courts, to abolish the labor courts entirely,<sup>139</sup> to abandon tenure for judges, to allow state governors to set judges' salaries,<sup>140</sup> to raise the retirement age for judges to seventy-five from seventy,<sup>141</sup> and to create a new route of appeal to the STF that would extract a pending constitutional matter out of a trial court and put it on the STF docket at the request of the federal Procurator General, the Attorney General, or the trial judge.<sup>142</sup>

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136. *Id.* at 260.

137. For a discussion of Brazilian judicial reform, See José Renato Nalini, *A Reforma Judicial no Brasil*, 712 *REVISTA DOS TRIBUNAIS* 330 (Feb. 1995).

138. Ruy Fabiano, *Notáveis Discutirão Reforma do Judiciário*, *GAZETA MERCANTIL*, July 10, 1998, at 8.

139. Mara Bergamaschi, *Governo Quer Tribunais Com Menos Poder*, *ESTADO DE SÃO PAULO*, May 21, 1995, at A12. According to some reports, President Cardoso has wanted to eliminate the labor courts since he was the Minister of Finance, because he and other founders of the Real Plan considered the labor courts a potential threat to economic stabilization. The fear was that labor courts would continue to index salaries, likely harming the anti-inflationary measures of the Real Plan. *Id.*

140. Luiz Orlando Carneiro & Eugênia Lopes, *Juízes Criticam Reforma do Judiciário*, *JORNAL DO BRASIL*, Feb. 27, 1997, at 8.

141. Francisco Marques, *Sépúlveda Não Quer Controle Externo de Salários de Juízes*, *JORNAL DO BRASIL*, Mar. 17, 1997, at 2.

142. Olímpia C. Neto, *Pertence Defende Novo Instrumento Processual*, *FOLHA DE SÃO PAULO*, Aug. 4, 1995, at 8 (reporting that the proposal, introduced by then-Minister of Justice Nelson Jobim, was provisionally called an "incident of constitutionality").

Many of these ideas emanating from the Planalto Palace quickly evaporated from the President's agenda and from public discourse.<sup>143</sup> Nonetheless, three of the reform proposals Cardoso endorsed have sparked significant debate in Congress and across the nation: binding precedent, external control, and arbitration.<sup>144</sup> I discuss below the contours of these reform proposals as well as the strains of debate surrounding them. They appear to be crafted primarily to ameliorate court delay, but they also, by limiting the power of the lower courts, address the issue of socially oriented lower court decisions that impair economic and state reform measures.

#### A. *Proposal to Make STF Decisions Binding*

One of the most intensely debated proposals for judicial reform would amend the 1988 Constitution to require lower courts to adhere to the constitutional decisions of the highest court, the Supreme Federal Tribunal. This binding precedent proposal is similar to the principle of *stare decisis*, but the measure would make only the Court's summary, or *súmula*, binding on lower courts.

The idea of compelling lower courts to adhere to the *súmulas* of the STF was most recently introduced on the public agenda in 1994 by then-Senator Nelson Jobim as a substitute to a proposed constitutional amendment.<sup>145</sup> Jobim, a close colleague of President Cardoso, suggested that a decision of a superior court regarding a frequently litigated matter should be binding on all lower courts upon the approval of three-fifths of the court's members.<sup>146</sup> Jobim's proposal also provided that courts, the federal or any state attorney general, the federal or any state district attorney, or the federal Bar Association could peti-

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143. Despite Cardoso's plethora of ideas related to the courts, judicial reform has not ranked prominently among his top policy priorities. Reversing Brazil's economic growth strategy has consumed most of Cardoso's policy agenda. See, e.g., Brazil's Coming of Age, *THE FINANCIAL TIMES OF LONDON*, Oct. 28, 1997, at 17.

144. In March 1999, charges of corruption in the judiciary reenergized debates over judicial reform. Cardoso weighed in by pledging support for new reform measures pending in Congress. Among these are a constitutional amendment to create a version of small claims court (*juizados especiais*) in the federal courts to adjudicate primarily administrative and welfare matters involving small sums. *Governo Vai Fatiar as Mudanças do Judiciário*, *JORNAL DO COMMERIO*, March 12, 1999, at 14; Luiz Orlando Carneiro, *Judiciário Faz Reforma sem Alarde*, *JORNAL DO BRASIL*, March 7, 1999, at 14.

145. Jobim's proposal was not entirely unique. The Institute of Brazilian Lawyers (*Instituto dos Advogados Brasileiros*), a group affiliated with the Bar Association, presented in 1946 the idea of a "unified jurisprudence of the STF" that would have been obligatory for all courts. The same idea was reintroduced in 1964 as proposed legislation. Cármen Lúcia Antunes Rocha, *Sobre a Súmula Vinculante*, 34 *REVISTA DE INFORMAÇÃO LEGISLATIVA* 51, 55 (1997). In 1993, the President sent a bill to Congress to amend the civil procedure code with regard to the judgment of identical questions. It would have allowed a court, upon a vote of the absolute majority of its members, to require that court to follow the same *súmula* for all cases involving the identical question of law. Fernando da Costa Tourinho Neto, *Efeito Vinculante das Decisões do Supremo Tribunal Federal: Uma Solução para o Judiciário*, 32 *REVISTA DE INFORMAÇÃO LEGISLATIVA* 185 Outubro/Dezembro 1995 at 185, 188-89 (discussing *Projeto de Lei* n° 3.804).

146. *RELATORIA DE REVISÃO CONSTITUCIONAL, PARECERES PRODUZIDOS (HISTÓRICO), SENADO FEDERAL, TOMO I* at 238-39 (1994).

tion to revise or nullify a *súmula*. The Senate never voted on this version of the binding precedent proposal.

In 1995, President Cardoso assumed office and appointed Jobim as his Minister of Justice. In February of that year, Jobim announced that the Ministry was preparing to send to Congress proposed constitutional amendments to reform the judiciary. The binding precedent proposal figured prominently in this reform package.<sup>147</sup> Both the Senate and the Chamber of Deputies were soon debating different versions of the binding precedent proposal and have continued to do so since then.<sup>148</sup> A version passed by the Senate sought to make binding only the STF decisions related to two different actions for abstract review of the constitutionality of a law or act.<sup>149</sup> Another version pending in the Chamber of Deputies as of early 1999 sought to make all constitutional decisions of the STF binding on lower courts.<sup>150</sup>

The idea of implementing binding precedent has generated noisy and divisive debate. Supporters of the proposal include a majority of the justices sitting on the STF, as well members of Congress from political parties aligned with President Cardoso. The most oft-cited justification of binding precedent is the assertion that it would alleviate backlog in the court system.<sup>151</sup> Supporters suggest that between eighty-five to ninety percent of the cases before the STF in-

147. Luiz Orlando Carneiro, *Emenda Põe Fim à "Indústria de Liminares,"* JORNAL DO BRASIL, Feb. 21, 1995, at 3.

148. See, e.g., *Proposta de Emenda à Constituição Federal Nº 54 de 1995*. This amendment would have made substantive STF decisions binding on lower courts and expressly on "the Executive power" as well. The Senate failed to pass this proposal and a number of rewritten substitute proposals. In the Chamber of Deputies, Deputy Hélio Bicudo, representing the Worker's Party in São Paulo, proposed a series of constitutional amendments in 1992 to modify the judiciary. *Proposta de Emenda à Constituição Federal Nº 96 de 1992*. The text of his bill was revised substantially through the legislative process to include, by 1995, a provision for binding precedent. One version also proposed sanctioning lower court judges who failed to adhere to STF decisions that the higher body voted to make binding.

149. The proposed amendment would have applied to STF decisions in direct actions of unconstitutionality and declaratory actions of constitutionality, should the STF vote to do so by a two-thirds majority. *Proposta de Emenda à Constituição Federal Nº 500 de 1997* (Do Senado Federal), *Proposta de Emenda à Constituição Federal Nº 54 de 1995* (Proposal to amend art. 102, sec. 2 of the Federal Constitution). Direct actions of unconstitutionality and declaratory actions of constitutionality are both matters of original jurisdiction. A direct action of unconstitutionality is a powerful instrument allowing the STF abstract review of laws and administrative acts. The review may be initiated by the President of the Republic, the Senate, the Chamber of Deputies, a state legislative assembly, a state governor, the Procurator-General of the Republic, the Brazilian Bar Association, a political party represented in the national Congress, a union confederation, or a national class entity. BRAZ. CONST. art. 103. Declaratory actions of constitutionality, created in 1993, allow the President of the Republic, the Senate, the Chamber of Deputies, or the Procurator-General of the Republic to argue preemptively that a law or administrative act is constitutional or to defend its constitutionality while a challenge is pending in a lower court. BRAZ. CONST. arts. 102 & 103, sec. 4. These latter decisions are already binding on lower courts. The mechanism was apparently developed to give the government the same power to sustain a law that citizens have to contest it through a direct action of unconstitutionality.

150. *Projeto de Lei 2.960* (draft legislation); Fred Suter, *Efeito Vinculante*, O DIA, Jan. 23, 1999.

151. See, e.g., Leandro Paulsen, *Justiça Federal: Propostas Para o Futuro*, in A JUSTIÇA FEDERAL: UNA PROPOSTA PARA O FUTURO 72 (1995) (stating that binding precedent would produce faster and more predictable judgments); Velloso, *supra* note 102, at 8-9 (averring that binding precedent will diminish the number of appeals and speed case processing).

volve questions already adjudicated by that Court.<sup>152</sup> The constitutionality of applying a minimum wage floor to pensioners, for example, was appealed to the STF more than 8,000 times, despite the STF's consistent decisions in favor of the law.<sup>153</sup> Binding precedent seeks to eliminate such appeals, freeing up the docket of the highest Court. In addition, binding precedent might ease the burden on trial courts by deterring parties from initiating cases on matters for which there is a clear and binding STF decision.

These calls for a more efficient judiciary are bolstered by fear that Brazil's lethargic courts dissuade potential investors. Lawyers have circulated stories that foreign business clients opt out of privatization auctions and other investment opportunities because the judiciary functions too slowly.<sup>154</sup>

As a corollary justification, supporters argue that diminishing the number of cases in the court system will improve access to justice. An advisory council appointed by President Cardoso declared support for binding precedent as a way of lowering the costs of litigation, presumably because a speedier judgment is a less costly one.<sup>155</sup> The advisory council also suggested that binding precedent would reduce the transactional costs associated with lethargic justice.

Some proponents maintain that binding precedent would harmonize constitutional decisions and bring more predictability to the law. Similarly, Cardoso's former Minister of Justice, Nelson Jobim, stated that binding precedent, along with other judicial reform proposals, was intended to put a stop to the "industry of injunctions" perpetuated by lower courts, referring to the fact that lower courts frequently impose preliminary injunctions against the government.<sup>156</sup> Jobim suggested that binding precedent was needed to avoid repeating judicial battles such as those that occurred over the corporate tax to finance social security. Even after the STF determined that the tax was constitutional, businesses were still able to secure judgments from lower courts absolving them of the obligation to pay the tax.

Cardoso's current Minister of Justice, Renan Calheiros, echoed this motive for judicial reform. He stated that Cardoso specifically supports the binding precedent measure out of a hope that it will curb the "industry of injunctions."

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152. The former president of the STF estimated that 90% of the cases before that court are repeated matters. Franklin Campos, *Sepúlveda Aceita Críticas da Sociedade*, JORNAL COMMERCIO, Mar. 22, 1997, at 6. Others claim that 85% of the STF cases involve the same issue. RONALDO CUNHA LIMA, DO EFEITO VINCULANTE 7 (1997).

153. RONALDO CUNHA LIMA, DO EFEITO VINCULANTE 7 (1997).

154. Ruy Fabiano & Juliano Basile, *Judiciário Eleva Custo Brasil e Inibe Investimentos*, GAZETA MERCANTIL, Aug. 31, 1998, at 20 (reporting on a North American client of the law firm White & Case that opted out of the privatization of a Brazilian electrical company and quoting another lawyer as asserting that "judicial reform is urgent and can create more opportunities for business in Brazil").

155. MINISTÉRIO DA ADMINISTRAÇÃO FEDERAL E REFORMA DO ESTADO, O CONSELHO DE REFORMA DO ESTADO, CADERNO 8, at 30 (1997) (listing the recommendations of the Council of State Reform, created by presidential decree in December, 1995).

156. Luiz Orlando Carneiro, *Emenda Põe Fim à 'Indústria de Liminares'*, JORNAL DO BRASIL, Feb. 21, 1995, at 3.



He further noted that courts are using injunctions "as weapons to postpone government decisions."<sup>157</sup>

Opposition to binding precedent is widespread in Brazil. The Brazilian Bar Association, while calling for major reform of the judiciary, has lambasted the proposal as impairing the independence of judges. A statement from the Bar Association's 1996 national conference declared that "it is necessary that judges remain independent, free from economic and hierarchical constrictions. Because of this, we alert the nation against proposals for reform that claim to attribute binding effect to the decisions of the higher courts."<sup>158</sup> Some lawyers suggest that their colleagues oppose binding precedent because it would constrain appellate practice, a large segment of business for Brazilian attorneys.

A more recent survey of Rio de Janeiro Bar members, however, indicates that lawyer opposition to binding precedent might be waning. Research released in early 1999 suggests that over sixty-eight percent of Rio lawyers now approve the adoption of binding precedent. Following five years of opposition, this sudden support is curious. The same survey queried about reforms that might enhance professional opportunities for lawyers, perhaps mitigating the potential negative professional ramifications of binding precedent. For example, this questionnaire revealed that over eighty-three percent of Rio Bar members favor eliminating court fees and ninety-two percent support increasing the hours of court operation.<sup>159</sup>

Most judges disapprove of the binding precedent measure. A survey of state and federal judges conducted in 1993 indicated that only 33.9% of judges favored making the constitutional decisions of higher courts binding on lower courts.<sup>160</sup> Critics argue that the measure would fetter judicial independence and violate the constitutional mandate for separation of powers.<sup>161</sup> Many believe that lower court judges need to be free from the dictates of the judicial hierarchy in order to exercise independence. According to one association of judges, "constitutional guarantees should be a product of a democratic dialectic, not justified by hierarchical control."<sup>162</sup> Some detractors also argue that binding

157. *Governo Vai Fatiar as Mudanças do Judiciário*, JORNAL DO COMMERIO, Mar. 12, 1999, at 14 (citing Minister Calheiros).

158. Conselho Federal da Ordem dos Advogados do Brasil, *Carta de Fortaleza*, in XVI Conferência Nacional dos Advogados, Anais: Direito, Advocacia e Mudança, Fortaleza, Setembro de 1996, at 39 (1997). Lawyers for state and federal governments, including prosecutors, also oppose the idea of binding precedent. Only 22% declared support for the proposal. INSTITUTO DE ESTUDOS ECONÔMICOS, SOCIAIS E POLÍTICAS DE SÃO PAULO, O MINISTÉRIO PÚBLICO E A JUSTIÇA NO BRASIL 49 (Maria Tereza Sadek ed., 1997). The Instituto de Estudos Econômicos, Sociais e Políticas de São Paulo (IDESP) conducted a survey of 763 state and federal lawyers, including prosecutors, located in the states of São Paulo, Rio Grande do Sul, Paraná, Rio de Janeiro, Sergipe, Bahia, and Goiás.

159. Ordem dos Advogados do Brasil, Seção do Rio de Janeiro, Departamento de Pesquisa e Documentação, *Reforma do Poder Judiciário*. The survey was disseminated to Bar members in December 1998 and the undated draft report was received by the author in April 1999.

160. INSTITUTO DE ESTUDOS ECONÔMICOS, SOCIAIS E POLÍTICAS DE SÃO PAULO, A CRISE DO JUDICIÁRIO, VISTA PELOS JUÍZES: RELATÓRIO DE PESQUISA 10 (1994).

161. Lenio Luiz Streck, *O Efeito Vinculante e o Mito da Efectividade*, 2 JUSTIÇA E DEMOCRACIA 41, 44 (1996) (official publication of the Association of Judges for Democracy).

162. Antonio Carlos Villen & Dyrceu Aguiar Dias Cintra Junior, *Controle Externo e Interno do Judiciário: O Controle Político-Ideológico e as Súmulas Vinculantes*, Numero Especial de Lança-

precedent will lead to the petrification of law, making it unable to respond to the needs of an evolving society.

At least one higher court judge supportive of binding precedent suggested that trial court judges opposed the proposal because it could have adverse ramifications on a judge's advancement through the judicial career path.<sup>163</sup> Promotions are based on appellate judges' evaluations of trial judges' work, and merit is often exhibited by brilliantly written opinions. Thus, if a trial court decision is not appealed, higher court judges do not examine the skill evidenced in the lower court opinion. A trial judge who opposes the proposal expressed his concern about the effect that a diminished emphasis on trial court decisions would have on the quality of judging, suggesting that the prospect of promotion is a key incentive for trial judges to draft thoughtful opinions.

### B. Initiative to Create an "External" Oversight Council

The proposal to amend the Constitution to allow "external control" over the judiciary has attracted nearly the same amount of controversy as the binding precedent proposal. The idea of creating a body to oversee the court system emerged during debates surrounding the drafting of the 1988 Constitution.<sup>164</sup> Some members of the Constituent Assembly backed the creation of a National Council of Justice, composed of judges and members of civil society, to supervise administrative aspects of the court system. That such a council would have included people outside of the judiciary has caused this and similar proposals to be dubbed "external control" measures. Judges, well-organized and cohesively opposed to the idea, swiftly eliminated the measure from the drafters' agenda.<sup>165</sup>

In June 1995, left-leaning politicians proposed a constitutional amendment to create councils to oversee the judiciary.<sup>166</sup> The amendment sought to establish state councils, a federal district council, and a federal council to supervise budget matters of the courts and make decisions regarding the career advancement of judges.<sup>167</sup> Each council would be comprised of judges, citizens, and lawyers.<sup>168</sup>

Although external control was initially thought to be an opposition initiative, President Cardoso's administration supported the idea as early as May

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mento, JUSTIÇA E DEMOCRACIA 36 (1995) (stating the position of the Association of Judges for Democracy).

163. Jobim, *supra* note 118.

164. Many European court systems incorporate judicial councils to oversee administrative matters.

165. The judges' lobby was apparently so forceful that members of the constituent assembly complained that their offices and hallways were invaded by lobbyists who followed them even to the washroom. JUNQUEIRA ET AL., *supra* note 64, at 149-50.

166. *Proposta de Emenda à Constituição* N°112-A de 1995, introduced by Deputy José Geoino, a member of the Worker's Party from the state of São Paulo.

167. Specifically, the councils would decide matters related to the judiciary's annual proposed budget, life tenure, the creation and elimination of courts, the creation and elimination of offices of the bench and auxiliary services, indications of merit for the purposes of promotion, and impeachment from office. *Proposta de Emenda à Constituição* N° 112-A de 1995, 2.

168. Similar oversight councils have figured prominently in judicial reform measures adopted by other Latin American countries. Sáez Garcia, *supra* note 38, at 1309.

1995, and it has since become recognized as one of the Executive's proposals.<sup>169</sup> In June 1996, the Chamber of Deputies unveiled a proposed constitutional amendment to reform the judiciary that included another version of the external control councils.<sup>170</sup> This version prescribes the establishment of a National Council of Justice, with a membership of judges and lawyers. The National Council of Justice would oversee internal rules, handle complaints against the judiciary, and participate in strategic planning and institutional evaluation.<sup>171</sup> President Cardoso supported this provision and gave it more legitimacy when his advisory council backed the formation of the National Council of Justice as an indispensable component of judicial reform.<sup>172</sup> As of May 1999, neither chamber of Congress had approved this or any other external control proposal.

The debate regarding external control centers on notions of efficiency, democracy, and independence. Supporters claim that external oversight is necessary to enhance the efficiency of the courts. This view is premised on allegations that judges squander public resources or appropriate them for personal ends and that judges fail to reach their productive capacity. Proponents also claim that oversight will make the procedural operations of the judiciary transparent, a necessary feature in a democratic society.<sup>173</sup>

Representatives of the Bar Association spoke out in favor of external control (at least in favor of the versions giving representation to the Bar), alleging that internal control is "corroborative and inefficient."<sup>174</sup> Similarly, a survey of state and federal government attorneys—who also are represented in various versions of the proposed oversight body—indicated support, with sixty-two percent either somewhat or absolutely in favor of external control.<sup>175</sup>

Judges, on the other hand, have never warmed to the external control idea. The members of the Association of Judges for Democracy unanimously oppose any type of control that could interfere with the liberty of each judge to render his or her decisions.<sup>176</sup> A survey of judges indicated that 86.5% of judges oppose external control over the judiciary.<sup>177</sup> The Association of Judges of Brazil

169. President Cardoso's then Minister of Justice, Nelson Jobim, asserted in 1995 that a mechanism of external control to oversee the acts of judges and curb abuses would be part of President Cardoso's proposed judicial reform package. *Jobim Pede Controle Externo da Justiça*, JORNAL DO BRASIL, May 12, 1995, at 1. Jobim defended the notion of external control when he was a Senator contemplating an external control constitutional amendment in 1993.

170. *Substitutivo à Proposta de Emenda à Constituição Nº 96 de 1992*.

171. *Id.* at sec. III, art. 108, subsec. 6.

172. Chico Otavio, *Conselho Propõe Mudanças no Judiciário*, ESTADO DE SÃO PAULO, Oct. 19, 1996, at 5.

173. Fredy Krause, *Próximo Presidente do STF Defende Mudanças*, ESTADO DO SÃO PAULO, Apr. 10, 1997, at 6 (quoting the incoming president of the STF, José Celso de Mello, as stating that no organ of the state can be immune from oversight and investigation in a truly democratic society).

174. Jairo Carneiro, Relatório, *Proposta de Emenda à Constituição Nº 96 de 1992*, p. 8 (quoting from the testimony of Sérgio Sêrulo da Cunha, spokesperson for the Bar Association).

175. INSTITUTO DE ESTUDOS ECONÔMICOS, SOCIAIS E POLÍTICAS DE SÃO PAULO, O MINISTÉRIO PÚBLICO E A JUSTIÇA NO BRASIL, *supra* note 158, at 50.

176. Villen & Cintra Jr., *supra* note 162, at 34.

177. INSTITUTO DE ESTUDOS ECONÔMICOS, SOCIAIS E POLÍTICAS DE SÃO PAULO, A CRISE DO JUDICIÁRIO, *supra* note 160, at 11. A smaller survey of state court judges in Rio de Janeiro state

(*Associação do Magistrados do Brasil*, or AMB) lobbied against external oversight, calling the measure unconstitutional “nonsense” and claiming that it devalued judges.<sup>178</sup> Likewise, most STF justices oppose external control on the grounds that it impairs their independence and have instead proposed a series of “internal controls” by a council made up of appellate judges.<sup>179</sup>

Despite widespread opposition of judges, both the AMB and another group of judges, the Association of Federal Judges (*Ajufe*), recently capitulated to the idea of external control. The AMB formed a commission with the Bar Association in November 1998 to collaborate on creating proposals for judicial reform. The AMB stated its willingness to consider an oversight council made up of judges but conceded that lawyers could play a role in selecting judges. The federal judges’ organization went a step further when it stated in January 1999 that it would support an oversight body to manage administrative questions, particularly if that body would distribute budgetary resources more evenly throughout the federal courts. Judges’ recent acquiescence to some form of oversight body may be born of the realization that Congress may soon approve the constitutional amendment. The fall 1998 elections brought changes to Congress, possibly rendering passage of the external control measure more likely. Additionally, judges may be accepting external control as part of a trade-off for their own reform plans. For example, both the AMB and *Ajufe* are pushing for a role in nominating candidates to fill Supreme Court vacancies.<sup>180</sup>

Others opposed to external control pointed out that the Bar Association and the Public Prosecution Ministry already are in a position to supervise the judiciary because of the constitutional requirement that one-fifth of most courts be composed of private and Public Ministry lawyers.<sup>181</sup> Others argue that the higher courts already are subject to societal control because many of their deliberations are public, their opinions are published, and they are subject to removal from the bench in the “public interest.”<sup>182</sup>

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indicated slightly more opposition, with 89.2% of respondents reporting an unfavorable opinion of external control. JUNQUEIRA ET AL., *supra* note 64, at 202.

178. *Controle Externo Desvaloriza Magistratura*, JORNAL COMMERCIO, Feb. 15, 1997, at 10 (transcribing an interview with the AMB president, judge Paulo Medina). See also Luiz Orlando Carneiro & Eugênia Lopes, *Juízes Criticam Reforma do Judiciário*, JORNAL DO BRASIL, Feb. 27, 1997, at 8 (reporting that the AMB expressed “irritation” at proposals of the executive that prescribe external control of the judiciary and other measures).

179. Raquel Ulhôa, *Ministros do STF Propõem Mudanças*, FOLHA DE SÃO PAULO, May 23, 1995, at 10.

180. Fausto Macedo, *Juízes Propõem Controle Externo do Judiciário*, ESTADO DE SÃO PAULO, Jan. 21, 1999, at 8; Mariângela Gallucci, *Entidades Definem Método para Forçar Reforma*, ESTADO DE SÃO PAULO, Feb. 8, 1999, at 6. Both groups propose that federal judges present a list of possible candidates to the President for appointment to the STF. *Ajufe* also is urging an end to the constitutional mandate that one fifth of the seats on the Federal Regional Tribunals, and the Tribunals of the States, Federal District, and Territories be filled by lawyers rather than career judges. BRAZ. CONST. art. 94.

181. See, e.g., Wagner Rossi, *Justiça Não Deve Esperar*, ESTADO DE SÃO PAULO, Dec. 14, 1995, at 2 (authored by a federal congressman from São Paulo).

182. *A Urgente Reforma do Judiciário*, O ESTADO DE MINAS, Feb. 26, 1995, at 6 (citing STF Justice Carlos Mário da Silva Velloso’s opposition to the idea of external control). See BRAZ. CONST. art. 93, VIII.

### C. Legislation to Bolster Arbitration

President Cardoso signed a new arbitration statute into law on September 23, 1996, after four years of congressional debate on the measure.<sup>183</sup> This law followed a series of failed legislative attempts to renew outdated arbitration provisions in the civil code. In 1981, 1986, and 1988, the executive branch introduced arbitration proposals, but none met with legislative success either because they were technically flawed or because they failed to remedy the substantive ills of the former arbitration provision.<sup>184</sup>

The most significant innovation of the new law is to bypass the court system entirely. The former law governing arbitration required the parties to submit an arbitration award to the court for ratification. The new legislation omits this requirement to speed the process of decision-making and maintain the secrecy of arbitration proceedings. The new law also gives more effect to arbitration clauses drafted into contracts. Previously, arbitration clauses were not binding on the parties who agreed to them.<sup>185</sup>

Supporters of arbitration primarily tout it as a way of securing fast resolutions to business conflicts.<sup>186</sup> Similarly, asserting that the backlog of cases in the judicial system impedes access to justice for most citizens, an advisory council to President Cardoso emphasized the importance of arbitration as one of a handful of recommendations for judicial reform.<sup>187</sup> Secondly, supporters assert that arbitration would be less costly, less public, would help preserve ongoing business relationships, and would be useful in resolving international commercial disputes.

Arbitration reform, although controversial, did not generate the full-scale attacks launched by groups of judges and lawyers against other proposals related to the judiciary. The Bar Association did not take a stance on the measure, but

183. Arbitration has been legally recognized in Brazil since Portuguese colonization, and provisions for arbitration have been included in Brazilian law since the Commercial Code of 1850. Sálvo de Figueiredo Teixeira, *A Arbitragem no Sistema Jurídico Brasileiro*, 161 REVISTA TRIMESTRAL DE JURIPRUDÊNCIA DOS ESTADOS, Nov.-Dec., 1997 at 9, 15. Nonetheless, a recent study concluded that approximately two-thirds of Brazilian businesses never use arbitration or mediation clauses in any contracts and an additional 30% use such clauses either rarely or in some contracts. INSTITUTO DE ESTUDOS ECONÔMICOS, SOCIAIS E POLÍTICAS DE SÃO PAULO, ECONOMIC COSTS OF JUDICIAL INEFFICIENCY IN BRAZIL, *supra* note 101, at 9. This data derives from a 1996 survey of over 600 Brazilian businesses soliciting information related to practices over the previous three years.

184. CARLOS ALBERTO CARMONA, *ARBITRAGEM E PROCESSO: UM COMENTÁRIO À LEI 9.307 DE 199, 18-21* (1998).

185. *Id.* at 12.

186. People who took part in the project to draft the legislation included university professors, representatives of large law firms, representatives of national business organizations, and representatives of groups or individuals who sought to capitalize on the institution of arbitration. For example, one of the three primary drafters was the director of the Chamber of Mediation and Arbitration of the International Chamber of Commerce. A law professor heavily involved in drafting proposed legislation stated that the measure was not instigated by transnational corporations seeking more hospitable alternatives to the Brazilian judiciary, contrary to the assertion of some critics. Telephone Interview with Carlos Alberto Carmona, Law Professor, University of São Paulo (July 6, 1998).

187. MINISTÉRIO DE ADMINISTRAÇÃO FEDERAL E REFORMA DO ESTADO, *supra* note 155, at 30 (recommending immediate implementation of the new arbitration statute, support for education campaigns regarding the new mechanisms, technical support for the establishment of arbitration centers, and the promotion of courses for arbitrators).

many lawyers opposed the legislation out of fear that it would diminish opportunities for lawyers.<sup>188</sup> Judges also failed to mount cohesive opposition, but many worried that the measure would lessen their influence. Some detractors argued that the law improperly deprives courts of jurisdiction, given the provision in the 1988 Constitution guaranteeing a right to judicial resolution of an injury.<sup>189</sup> Additionally, some individuals, judges included, expressed concern about the possible inequities of a parallel and private justice system. Many observers, however, treated the proposal with disinterest.

## VI. EXPLAINING JUDICIAL REFORM CHOICES

Binding precedent, external control, and arbitration are presented as technical approaches to an essentially political problem arising from the use of courts to challenge government measures to make Brazil more globally competitive. At least three factors might explain this technical discourse. First, the reliance on technical solutions to solve the judiciary's ills is an approach familiar to Brazilian policy makers because it mirrors the strategy pursued by the World Bank and other institutions engaged in judicial reform programs worldwide. Second, ensconced within the problem of political litigation in the courts is the more technical problem of court delay, which binding precedent, external control, and arbitration attempt to address. Finally, these judicial reform measures also speak to the political problem posed by socially oriented lower courts by limiting their ability to impair the progress of key free market reforms. This section explores these ideas and discusses different options to ameliorate court delay and limit the reach of the lower courts. It concludes by suggesting that more viable delay reduction measures do not factor into Cardoso's judicial reform agenda because they fail to restrict the power of lower courts, and that steps to more overtly control lower courts are omitted for political reasons.

### *A. Global Emphasis on Technical Approaches to Judicial Reform*

Judicial reform projects of the World Bank, the Inter-American Development Foundation, and other global actors emphasize technical solutions to judiciaries' faults by seeking to improve the "efficiency" of the judiciary.<sup>190</sup> This strategy begins with the premise that judiciaries perform certain basic tasks, such as law determination and conflict resolution, which are vital to socioeco-

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188. Livia Ferrari, *Lei Sobre Arbitragem Provoca Polêmica*, GAZETA MERCANTIL, Sept. 30 1997, at 3.

189. BRAZ CONST. art. 5, sec. XXXV (stating that "no law may exclude from review by the Judiciary any injury or threat to a right").

190. The propriety of this focus has been the topic of heated debate. Some scholars suggest that the emphasis on technical approaches stems from "[t]he myth that the problems facing the Latin American judiciary are mostly 'quantitative' and managerial deriv[ing] from shallow evaluations carried out by experts not familiar with the systems [sic] pitfalls." Sáez Garcia, *supra* note 38, at 1315 n.142. Technical solutions may fail to adequately consider and ameliorate the root causes of flaws in judicial systems, which often have socio-political origins. See, e.g., HAMMERGREN, *supra* note 10; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 37.

economic development and political stability. Judicial systems incapable of performing these functions competently put individuals' well being, social and economic activity, and political stability at risk. Improving a judiciary's capacity to perform these functions usually involves efforts to speed up the execution of these functions.<sup>191</sup> Accordingly, World Bank judicial reform efforts and those of other global actors often center on improving case management techniques, information systems, court personnel and court facilities.<sup>192</sup>

Most likely the Cardoso administration is familiar with the technical tactics adopted by the World Bank, the Inter-American Development Bank, USAID, and others active in working with Latin American judiciaries. Given the significant presence and influence in the region of these institutions and their judicial reform projects this familiarity is not surprising.<sup>193</sup> Indeed, arbitration and the type of judicial oversight councils suggested in various renditions of Cardoso's external control proposal are two measures specifically propounded by global entities involved in crafting and executing Latin American judicial reform initiatives.<sup>194</sup>

Although Brazil has not hosted comprehensive judicial reform initiatives sponsored by these organizations, the World Bank has informally discussed the prospect of initiating reform measures to improve the efficiency of the Brazilian judiciary with Brazilian lawyers, judges, and policy makers periodically over the past few years.<sup>195</sup> Brazilian government officials have been reluctant to submit to direct international involvement in the judiciary and are loath to borrow funds

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191. HAMMERGREN, *supra* note 10, at 3.

192. See, e.g., Maria Dakolias, *The Judicial Sector in Latin America*, WORLD BANK TECHNICAL PAPER NUMBER 319 (1996).

193. In 1992, the World Bank launched its flagship involvement in the judicial reform arena by supporting a \$30 million Bank loan for the Venezuelan Judicial Infrastructure Project. The World Bank has since provided over \$45 million in loans for additional judicial reform projects in Latin America: \$11 million to Bolivia in 1995, \$10.7 million to Ecuador in 1996, and \$22.5 million to Peru in 1997. The Inter-American Development Bank (IADB) entered the judicial sector reform arena in 1995 with loans in that year of \$11.2 million to Costa Rica and \$9.4 million to Colombia. In 1996, the IADB provided loans of \$22 million to Paraguay, \$22.2 million to El Salvador, \$7.2 million to Honduras, and \$12 million to Bolivia. Peru received a \$20 million IADB loan in 1997. Santos, *supra* note 33, at 19. The USAID began funding and coordinating judicial improvement projects in Central America in the 1985, with a Congressional mandate to devote at least \$20 million annually to support the Administration of Justice Program. José E. Alvarez, *Promoting the "Rule of Law" in Latin America: Problems and Prospects*, 25 GEO. WASH. J. INT'L L. & ECON. 281, 285-86 (1991). In 1986 USAID launched Administration of Justice projects in Bolivia, Colombia, Ecuador, and Venezuela, with a focus on court reform. In the early 1990s, USAID invested in Rule of Law programs that also were intended to reform Latin American judiciaries. For example, USAID recently initiated a \$63 million court reform Rule of Law project in Colombia.

194. The World Bank, for example, suggests that judicial councils can be valuable in nominating candidates for the bench, selecting judges, and overseeing judicial administration and disciplinary matters. DAKOLIAS *supra* note 192, at 12. The World Bank, along with other international or transnational organizations involved in judicial reform, highlights arbitration and other alternative dispute resolution techniques, suggesting that "ADR can provide parties alternative methods to resolve their disputes amicably without the delays of the formal system." *Id.* at 47. Similarly, in 1994, USAID co-sponsored the "First Inter-American Meeting on Alternative Dispute Resolution," held in Buenos Aires. And, in a 1998 conference co-sponsored by the Inter-American Development Bank, "Judicial Reform in Latin America: Advances and Obstacles for the New Century," included a session on alternative dispute resolution.

195. Interview with Antonio Magalhães, World Bank, in Brasília, Braz. (June 6, 1998).

from the World Bank for judicial reform efforts. During 1998, World Bank officials conducting a comparative study on the efficiency of judiciaries suggested to a small group of Brazilian judges that they request that their government invite the Bank to include Brazil in the study. After the Bank lined up the requisite support from within the judiciary, the Brazilian government agreed to participate in the study.<sup>196</sup>

### *B. Judicial Reform to Ameliorate Court Backlog*

Technical approaches to judicial reform not only are familiar and widely condoned, but they may also be instrumental in improving judicial systems. Overburdened court dockets present a significant obstacle to the administration of justice in Brazil that binding precedent, external control, and arbitration seek to address.<sup>197</sup> These proposals, however, are not artfully tailored to eliminate court delay, particularly when compared to practical and available alternatives.

Binding precedent seeks to unclog court dockets by extracting cases out of the appellate courts and discouraging new cases related to disputes for which the STF has already issued a binding decision. One version of the binding precedent proposal may not go far enough toward reducing delay because it would only make two limited categories of STF decisions binding on lower courts: those rendered in direct actions of unconstitutionality and declaratory actions of constitutionality.<sup>198</sup> Because an STF determination that an act is constitutional, in a declaration of constitutionality action, is already binding on lower courts, this proposal primarily targets direct actions of unconstitutionality (DAUs).

Both of these procedures attract politically charged issues. The DAU, in particular, is a popular tool through which unions and political parties challenge new political and economic reforms.<sup>199</sup> Given that the issues litigated through DAUs represent a small percentage of cases coursing through the courts, compelling lower courts to adhere to these decisions may not ameliorate court backlog. Additionally, even when the Supreme Court adjudicates a DAU, it frequently does so on procedural grounds that will not forestall many subsequent cases.<sup>200</sup>

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196. Telephone Interview with Alberto Ninio, World Bank (D.C. Oct. 27, 1998). The results of the study are not available.

197. Binding precedent, external control, and arbitration may also be intended to instill more predictability over judicial pronouncements. Yet, predictability in a general sense does not seem to be an issue, given that most lower courts already adhere to the decisions of higher courts. In addition, civil law systems typically attempt to impose foreseeability in the courtroom by making legislation more "judge proof."

198. See discussion *supra* note 149 (discussing direct actions of unconstitutionality and declaratory actions of constitutionality).

199. Between October 1988, when the new direct action of unconstitutionality became effective, and August 1996, the STF received 1,465 direct actions of unconstitutionality (out of a total 164,402 cases). José Reinaldo de Lima Lopes, *Brazilian Courts and Social Rights: A Case Study*, 6 (Apr. 1997) (unpublished manuscript on file with author) (citing statistics provided by the STF).

200. Of 113 direct actions of unconstitutionality filed by political parties from 1988 to 1992, only six had been given substantive decisions by February 1993. Marcus Faro de Castro, *O Supremo Tribunal Federal e a Judicialização da Política*, 34 *REVISTA BRASILEIRA DE CIÊNCIAS SOCIAIS* 147,



Even a binding precedent measure that would affect a broader range of cases may not be the best tool to solve court delay. For the most part, lower courts already follow the decisions of higher courts.<sup>201</sup> It is largely the lenient system of appeals—regardless of precedent—that adds to court backlog. Moreover, binding precedent may actually spawn additional litigation by prompting disputes regarding the interpretation of precedent. Causing such a shift in the focus of litigation would defeat the goal of reducing court delay.

The oversight body prescribed in various external control proposals may also prove a clumsy tool with which to enhance the efficiency of courts in a way that would ensure significantly swifter justice. An important factor causing lethargy in the courts is the lopsided ratio of cases to judges. Even if an oversight council can propose new sites for courts, as at least one version advocated, creating and staffing courts requires legislative budgetary authorization and an increase in the number of qualified judges, both of which would be beyond the purview of any oversight council. The Chamber of Deputies' version of the external control proposal would be even less successful in speeding up the justice system, given the more limited powers it ascribes to an oversight body.

Some judges perceive external control as a misguided attempt to bully judges into being more productive and alleviating delay. One judge invoked the military regime's efforts to frighten the judiciary into submission, stating that "it is important to remind society that not even in the era of Institutional Act Number 5 . . . were judges intimidated into proffering judgments . . ."<sup>202</sup>

Nor has the new framework for arbitration succeeded in reducing court delays. Indeed, almost three years after the effective date of the arbitration law, it still is met with indifference.<sup>203</sup> By most accounts, there is a general reluctance to submit disputes to arbitration. Despite the problems with Brazil's system of justice, parties to a dispute are wary of entrusting the resolution of their conflict to someone other than a career judge carrying the legitimacy of the state.<sup>204</sup> The law simply did not "take," as Brazilians describe laws that society ignores.

Alternative mechanisms for reducing court backlog already exist within current Brazilian law or legal tradition. For example, the federal government could voluntarily treat STF decisions as binding, as it has done in the past. At

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150-51 (June 1997). Perhaps it is the political nature of the cases brought through the DAU mechanism that renders the STF reticent to issue substantive decisions.

201. Evandro Lins e Silva, *Crime de Hermêutica e Súmula Vinculante*, JORNAL DO BRASIL, Sept. 16, 1996, at 9.

202. José Pinheiro Júnior, *Desembargador Afirma que Justiça Mais Ágil é Impossível*, JORNAL DO COMMERCCIO, July 9, 1998, at 8 (quoting Raldênio Bonifácio Costa, a federal judge in Rio de Janeiro).

203. Lúvia Ferrari, *Lei Sobre Arbitragem Provoca Polêmica*, GAZETA MERCANTIL, Sept. 30, 1997, at 3 (reporting that after one year of operation, the law was seldom used). Some individuals interviewed suggested that transnational corporations situated around the industrial center of São Paulo recently have become more interested in using arbitration as prescribed by the new law.

204. Perhaps illustrative of the degree to which the law is disregarded by the Brazilian legal community is the fact that a two-volume treatise published by a leading Brazilian law firm in English on Brazilian business law devotes less than one half of one page to the new law. PINHEIRO NETO, *DOING BUSINESS IN BRAZIL* §§ 8.144-8.146 (1999).

least half of the cases clogging the courts are a result of action by Federal governmental entities. Estimates indicate that sixty percent of cases in the courts involve the public sector and are repetitions of a small number of similar disputes.<sup>205</sup> More than half of these disputes relate to matters that the government has already lost on appeal. The government continues to appeal additional cases merely to stave off final payment of claims.<sup>206</sup> The executive branch previously instructed government lawyers not to appeal certain classes of cases in which the highest court has ruled against the government. For example, in 1995, the Treasury Department identified eight areas of disputes in which either the STF or the intermediate federal appellate court (Superior Tribunal of Justice) had rendered a final decision contrary to government interests.<sup>207</sup> Cardoso decreed that the Treasury Department would no longer appeal cases within these eight areas. Observers estimate that this measure alone extracted at least 120,000 cases from the court system.<sup>208</sup>

Judges, lawyers, and academics have posited numerous other proposals for eliminating delay in the court system. Among them are the following: eliminating or shortening court recesses, which account for two months of closure yearly;<sup>209</sup> altering the entrance examination for judges; implementing novel judicial recruitment strategies; computerizing court processes;<sup>210</sup> streamlining judicial administration; expanding the jurisdiction of small claims courts;<sup>211</sup> introducing small claims courts for federal matters; eliminating the excessive

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205. ARMANDO CASTELAR PINHEIRO, BANCO NACIONAL DE DESENVOLVIMENTO ECONÔMICO E SOCIAL, NOTA TÉCNICA AP/DEPEC n° 02/98, A REFORMA DO JUDICIÁRIO: UMA ANÁLISE ECONÔMICA 9 (1998); Franklin Campos, *Sepúlveda Aceita Críticas da Sociedade*, JORNAL COMMERCIUM, March 22, 1997, at 7 (estimating that 60% involve acts of the Federal government, the state of São Paulo, and the federal social security system). Between 1991 and 1996, inclusive, the federal government was a party in 35,898 cases, the federal pension fund for the private sector (Instituto Nacional de Seguridade Social) was a party in 27,696 cases, and the state of São Paulo was a party in 14,630 cases. Mariângela Gallucci, *Justiça Poderia Evitar 90% dos Processos*, GAZETA MERCANTIL, Feb. 12, 1997, at 9. During approximately the same time frame, the Federal government and the social security office initiated half of the appeals brought to the Supreme Court. Ricardo Balthazar, *Criação de Súmula Vinculante Divide Judiciário*, ESTADO DE SÃO PAULO, Feb. 12, 1997, at 12.

206. Franklin Campos, *Sepúlveda Aceita Críticas da Sociedade*, JORNAL COMMERCIUM, March 22, 1997, at 7. A justice of the STJ stated in a published interview that “[t]he Executive frequently uses the judiciary as an organ of regulation and control of cash on hand, always appealing in order to avoid paying cases lost in inferior courts.” *Juizes se Dividem Sobre Poder dos Tribunais*, FOLHA DE SÃO PAULO, Sept. 27, 1995, at 4.

207. Wladimir Gramacho, *Governo Vai Desistir de Ações*, GAZETA MERCANTIL, Aug. 23, 1995, at 7 (listing the eight areas, all involving taxes or tariffs).

208. *Id.*

209. *OAB Tem Projeto para Mudar o Judiciário*, ESTADO DE MINAS, Aug. 9, 1995, at 21.

210. Over 93% of judges suggest that computerizing court services would be an important step in speeding up the work of the courts. MARIA TERESA SADEK & ROGÉRIO BASTOS ARANTES, A CRISE DO JUDICIÁRIO E A VISÃO DOS JUÍZES 6 (1994).

211. A 1984 law authorized the optional creation of small claims courts and the 1988 Constitution made this option mandatory, compelling states to establish “special courts.” Congress finally passed enabling legislation in 1995, that expanded the jurisdiction of small claims courts, creating special courts with broader civil jurisdiction and jurisdiction over criminal matters with penalties of less than one year detention. The 1995 law, however, left the task of organization and structure to state legislatures. Accordingly, some states have yet to establish these special courts.

formalities surrounding the prosecution of a law suit;<sup>212</sup> utilizing Brazil's class action mechanism ("ações civis públicas"),<sup>213</sup> reducing the number of automatic appeals;<sup>214</sup> requiring an unsuccessful appellant to be liable for the lawyers fees of the respondent; instigating a certification process whereby the attorney general could request but not compel a lower court to stay proceedings in a case implicating a controversial constitutional matter and submit the issue directly to the STF for adjudication; and introducing petitions for certiorari to pare down the number of cases the STF adjudicates. These and other options may unclog courts as ably or more adeptly than the proposals Cardoso supports.

Given these readily available alternatives, why does the Cardoso administration so heavily promote the limited delay reducing potential of binding precedent, external control, and arbitration? Cardoso's judicial reform agenda likely focuses on these three measures because they will constrain the power of socially oriented lower courts. Similarly, Cardoso's agenda omits proposals that might more directly solve court backlog because these would not also confine the reach of the lower courts. For example, if Congress rendered the appeal of trial court decisions less automatic, court delay could be substantially ameliorated. But without delay, the technical justification for binding precedent, external control, and arbitration would evaporate, making more plain their effect of limiting the reach of lower courts. Furthermore, restricting access to appellate courts could leave intact trial court decisions unfavorable to government economic and state reform initiatives.

### C. *Judicial Reform That Limits the Power of Lower Courts*

Binding precedent, external control, and arbitration, might only marginally minimize delay, but these measures would be effective in minimizing barriers to the implementation of the economic and state reform measures intended to root Brazil more firmly in a single world market. In order to carry out economic and state reform measures designed to enhance Brazil's stature in a global market, Cardoso must secure the acquiescence of socially oriented judges inclined to impose preliminary orders against the government. Accordingly, Cardoso supports a judicial reform agenda that restricts the reach of those lower court judges who thwart the government's transformation of Brazil's economy.<sup>215</sup>

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212. Ninety percent of judges agree that reducing procedural formalities would reduce the amount of time required to process a case through the justice system. SADEK & ARANTES, *supra* note 210, at 6. Lawyers and academics interviewed by the author echoed this perception.

213. The Brazilian Constitution also provides for a popular action (*ação popular*), a suit that can be instigated by any citizen to annul acts injurious to the public patrimony. BRAZ. CONST. art. 5, sec. LXXIII. This mechanism has been available to citizens since 1946 and is more widely used than the class action suit.

214. Over 67% of judges agree that limiting the opportunities for appeal would be key to improving the agility of the judiciary. SADEK & ARANTES, *supra* note 210, at 6.

215. Binding precedent, external control, and arbitration may also give voice to one vision of how a judiciary ought to fit within a democratic system. Rather than being measures to constrain the lower courts, these may be mechanisms to impose more accountability within the court system. If these judicial reform proposals, however, were part of an effort to make the judiciary more answerable to society, one might expect to find support for other judicial reform proposals that would encourage more accountability, such as an elected bench. This is not the case. Since March 1999,

The binding precedent proposal is a way of compelling lower courts to toe the line set by the STF. In order for this measure to limit the power of the lower courts in a manner favorable to the Executive, the latter must be in a position to influence the decisions of the STF. The STF, although fairly politicized, does not always adjudicate cases to the liking of the executive branch.<sup>216</sup> Recently, however, President Cardoso has begun to negotiate major political or economic reform initiatives informally with members of the STF prior to introducing them in Congress or by decree. One advisor to the President stated that negotiations regarding social security reform took place during the fall of 1997.<sup>217</sup> He indicated that this approach was a new Executive strategy to ensure vital STF support for reform proposals. These informal negotiations may also help ease the STF's reluctance to issue substantive decisions in politically charged cases, magnifying the hierarchical control that binding precedent could have over lower courts.

Likewise, an external control body, by definition, is intended to control the judiciary. An external control organ with authority over tenure, promotions, transfers, and court budgets and resources could use its power to intimidate, threaten, or punish lower court judges issuing decisions unpopular with the oversight body.<sup>218</sup> Similarly, the new arbitration provision neutralizes lower courts' impact by bypassing them altogether. Though cases directly determining the fate of an economic reform measure would probably not be subject to arbitration, arbitration maybe viewed as an effort to diminish the influence of lower courts.

Members of Cardoso's administration do not frequently promote binding precedent, external control, and arbitration as tactics to restrain lower courts,

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the idea for an elected judiciary has surfaced in the press, but there does not seem to be much support for it. And at the same time, the removal of an established accountability safeguard—eliminating lay judges from the labor courts—has attracted significant support.

216. Recall, for example, STF resistance during the military regime. *Supra* notes 43-47 and accompanying text. The executive appoints justices to the STF, with senate approval by an absolute majority. BRAZ. CONST. art. 101. Senate approval to date has rarely, if ever, involved significant debate.

217. These negotiations were not entirely successful. Executive branch officials discussed with some members of the STF an appropriate pension for STF justices that would serve as the ceiling for government worker retirement benefits. Having arrived at an agreeable figure, retirement benefits for all federal government employees were calculated against this ceiling. When the new retirement benefit plan was publicly unveiled, a member of the STF who had not been consulted complained that the plan failed to account for the fact that an STF justice who also had sat on the federal elections court could earn a pension even higher than other retired STF justices. This reminder threw the entire and elaborate pension scheme off kilter. According to the presidential advisor who relayed this story, the episode prompted an informal study of the ways in which the executive branch could best negotiate with the STF. Confidential interview, in São Paulo, Braz., (July 2, 1998).

218. The degree to which such an oversight body could threaten or intimidate lower court judges into upholding government reform measures depends on the degree to which government supporters control that body. There is little reason to believe that the oversight council would be controlled by members of the minority who oppose the government's economic and state reform trajectory. Speaking of the neoliberal platforms of Presidents Collor and Cardoso, one author writes that "Not since the populist period in Brazil have we seen political ideology being converted with such efficacy into an instrument of unification of the group in power and, at the same time, an instrument of legitimation of the special interests of the classes and fractions that made up this power bloc among the popular classes." Boito, Jr., *supra* note 95 at 72.

other than to suggest that binding precedent will end trial courts' "industry of injunctions."<sup>219</sup> Indeed, it is difficult to ascertain whether Cardoso supports these judicial reform measures with an express intent to limit the reach of lower courts. Nonetheless, legal academics, lawyers, and some judges interviewed suggest that Cardoso has endorsed this judicial reform agenda because of its potential to keep lower courts in check. Many specifically indicated that Cardoso may support binding precedent to deter lower courts from striking down tax reform initiatives central to the government's economic overhaul plan.

An advisor to the President and leading law professor suggested that judicial reform proposals are directly linked to tax reform. He asserted that Cardoso is backing judicial reform measures because the government cannot collect revenues while myriad cases challenging a tax law wind their way through the appellate process.<sup>220</sup> Confirming this view, one corporate lawyer and former state finance secretary asserted that judicial reform was intended to secure short-term economic benefits for the government, whether to bar judicial interference in tax collection or to end court battles over privatization: "The bottom line is always money."<sup>221</sup>

Two lower court judges claimed that Cardoso backs binding precedent because his privatization measures have lost so many challenges in lower courts. One of these judges claimed that Cardoso advanced judicial reform to ensure that courts do not get in the way of efforts to integrate Brazil into the global economy.<sup>222</sup>

One STF Justice interviewed did not directly link judicial reform proposals to the Executive's globally sanctioned economic and state reform efforts, but did so circuitously. He noted that the Executive's economic policies, coupled with the 1988 constitution's presupposition that citizens will monitor public matters through court action, has dramatically increased the number of cases in the courts, particularly those related to economic reform. He later suggested that government worries over the increased power of the courts partially explain bills pending in Congress to control the judiciary.<sup>223</sup>

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219. See *supra* notes 158 and 159 and accompanying text.

220. Confidential interview in São Paulo (July 2, 1998). Another prominent law professor also claimed that tax reform was the genesis for the Executive's support for binding precedent. But he suggested that the Executive's support has waned slightly after coming to the realization that the Supreme Court can use binding precedent to harm the Executive's interests. This professor specifically referred to an STF decision making Cardoso's salary adjustment for military personnel applicable to all federal civil servants and forcing the Cardoso administration to pay workers a costly retroactive salary increase. Interview with José Eduardo da Faria, Law Professor, University of São Paulo (July 2, 1998). The director of a law-related NGO suggested that contentious court cases stemming from harsh monetary reform measures spawned the binding precedent proposal. Interview with T. Miguel Pressburger, Coordinator, Instituto Apoio Jurídico Popular, in Rio de Janeiro, Braz., (June 17, 1998).

221. Interview with Jorge Hilario Gouvea Vieira in Rio de Janeiro, Brazil, (June 18, 1998).

222. Interview with José Renato Nalini, Judge, São Paulo Tribunal de Alcada Criminal, in São Paulo, Braz. (July 7, 1998). Along similar lines, the OAB issued a statement lambasting binding precedent as Cardoso's attempt "to exercise control over the judiciary." Conselho Federal da Ordem dos Advogados do Brasil, *supra* note 158, at 39 (presenting the "*Carta de Fortaleza*" statement from the 1996 national OAB conference).

223. Interview with Velloso, *supra* note 105.

Some observers simply note that judicial reform would further economic restructuring measures. A newspaper editorial supporting binding precedent complained that the 1988 Constitution permits young judges at the beginning of their careers, situated in small courts in the interior of the country, to grant injunctions contrary to decisions of the justices of the STF, paralyzing the execution of economic and fiscal policies of the federal government.<sup>224</sup> Urbano Ruiz, then president of the Association of Judges for Democracy, claimed that “[b]inding precedent is antidemocratic and centralized. Judges will come to judge according to the *súmulas* and not the law. The proposal was developed because of globalization of the economy . . . .”<sup>225</sup> Likewise, the current Association president asserted that judicial reform proposals work to restrict lower courts and to ensure the success of economic and state reforms.<sup>226</sup>

In the politically complicated arena of judicial reform in Brazil, it is fitting that Cardoso’s judicial reform strategy, couched in technical terms, has significant political overtones limiting the reach of the lower courts. Dual agendas surrounding judicial reform are not surprising or novel. Lawyers and judges opposed to binding precedent and arbitration argue that the former could weaken judicial independence and violate separation of powers, while the latter may result in parallel and unequal systems of justice. Judges and lawyers also seem to be motivated by deep-rooted professional concerns. Judges are fearful of losing power and influence, and lawyers are apprehensive of losing business. On the other hand, lawyers who back the external control proposal, ostensibly to make the judiciary more democratically accountable, may be equally interested in exerting authority over the courts. Similarly, Supreme Court justices supportive of binding precedent maintain that the measure will reinvigorate sluggish courts. They may also be inspired by the enhanced stature the measure promises.

Just as other choices exist to speed up court processes, alternative measures exist to rein in lower courts. Cardoso’s judicial reform agenda may not include additional or alternative delay reduction measures because these would not impose a hierarchy of control over lower courts. Measures that might more effectively curb socially oriented lower courts are not on Cardoso’s judicial reform agenda likely because they would be politically unpalatable.

Provisions in the 1988 Constitution represent a significant factor contributing to lower court decisions impairing the government’s economic and state reform measures. Liberal standing rules and new rights open the door for individuals and organizations to sue the government for diverse reasons. Constitutional amendments to restrict court access or to narrow the scope of rights afforded to Brazilians might diminish the number of political disputes in the courts and abate lower court interference in state and economic reform initia-

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224. *A Reforma do Judiciário*, JORNAL DA TARDE, Aug. 1, 1995, at 4.

225. *Juízes Se Dividem Sobre Poder dos Tribunais*, FOLHA DE SÃO PAULO, Sept. 27, 1995, at 4.

226. Interview with Dyrceu Aguiar Dias Cintra, Jr., President, Associação Juízes para a Democracia, in São Paulo, Brazil (July 8, 1998).

tives. Political support for such amendments, however, would be difficult to garner.

Additionally, Cardoso's judicial reform agenda could include measures that would more overtly control lower courts, such as allowing the Executive to appoint all federal trial judges, or to unilaterally remove cases in which the government is a party from a lower court to an appellate court. The political risks in doing so may have persuaded Cardoso to back a judicial reform agenda, framed in technical discourse, that indirectly and less overtly limits lower courts.

Asserting overt executive domination over courts might be judged as inherently antidemocratic and violative of the spirit of checks and balances embodied in the 1988 Constitution. As one STF Justice explained, Brazilian society is constantly measuring official actions against perceived norms of democracy.<sup>227</sup> To charge the judiciary with exerting too much independence, and to overtly assert executive power to curb judicial independence, would lend credence to opposition claims that Cardoso exhibits dictatorial tendencies.

Similarly, the Bar Association would not welcome obvious executive usurpation of judicial power. The Bar asserts enormous (albeit ebbing) influence over federal and local policy in Brazil.<sup>228</sup> Members of Congress and their staff indicate that the Bar is one of the most influential lobbying powers in Brasília. Traditionally, lawyers have been staunch defenders of the legal order and rallied against leaders who have stepped beyond their parameters of power. In fact, the Bar already spoke out against the binding precedent proposal because members view it as a threat to judicial independence.<sup>229</sup> Consequently, the Bar is in a solid position to undermine the executive's policy agenda should Cardoso pursue measures the Bar perceives to be overreaching.

Confronted with difficulties stemming from political use of the courts—court delay and lower court interference with economic and state reform measures—Cardoso has relied on technical discourse to frame a judicial reform agenda that nominally seeks to ease court backlog. This judicial reform strategy is in keeping with that of the World Bank and other institutions. Significantly, the technical rhetoric tends to obscure the fact that binding precedent, external control, and arbitration would restrict the reach of the lower courts, and would do so in a way that is politically more palatable than overt executive control over the judiciary.

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227. Interview with Velloso, *supra* note 105.

228. The Bar accrued tremendous social currency as one of the central instigators of the transition to democracy from authoritarian rule. Policy makers traditionally have been drawn from the ranks of the Bar. Recently, however, the Bar has segued into a more corporative role and is protecting professional concerns, diminishing its social prestige. See, e.g., DEZALAY & GARTH, *POLITICAL CRISES AS PROFESSIONAL BATTLEFIELDS*, *supra* note 54; and Junqueira, *supra* note 54.

229. Nonetheless, the Bar seems less quick to criticize Executive assumption of power that benefits lawyers, explaining why lawyers tend to favor the external control proposals in which they would play a role.

## VII.

### CONCLUSION

This article demonstrates that President Cardoso's choice of judicial reform proposals is shaped by the government's attempt to revamp Brazil's economy and bureaucratic state structure to engage in a single world market, in concert with the global neoliberal paradigm. Global and local pressures to insert Brazil more firmly in the global market are combining with the domestic dynamics of new rights, liberal standing to vindicate those rights, enhanced judicial remedies, and a socially oriented judicial philosophy to give rise to the problems of court delay and lower court injunctions that impair the progress of Cardoso's effort to restructure Brazil's economy. Cardoso's judicial reform agenda, while couched in technical terms resonating with a global emphasis on technical solutions to judiciaries' troubles, may prove less successful in easing court backlog than in restricting the power of the lower courts to interfere with economic policy.

On a broader level, this article illustrates that the relationship between law and globalization is not a uniform, one-way trajectory of global actors or trends altering local conditions. In Brazil, local actors instigate changes to the local condition of the judiciary in adherence to the global trend of engaging with the world market.

Within the context of Brazil, these findings diverge from an assumption underlying the global push for independent and efficient courts as the backbone of free market economies. The emphasis on bolstering the rule of law in emerging market countries and new democracies is premised on the assumption that broader access to independent courts will assist market-led economic development by leveling the playing field for economic actors and others, leading to certainty and predictability. To the contrary, in Brazil, broad access to unfettered courts has increased the use of courts as political instruments and, consequently, impaired the government's market-led development strategy.

These discoveries also raise concerns regarding the ramifications of a judicial reform agenda that focuses on problems rooted in the use of courts to challenge economic and political reforms. This strategy may ignore other ills of the judiciary, at least for the time being. Concrete alternatives that might ameliorate court delay are not being implemented because they do not also address the political problem posed by lower courts hampering of economic and state reform measures. Such alternatives, if successful in easing court backlog, would erase the technical justification of delay reduction attached to measures that limit lower court power. Given domestic concerns related to the length of judicial proceedings, and in light of global ideals about well-functioning judiciaries, Cardoso may eventually need to initiate judicial reform expressly crafted to reduce court delay.